

United States  
Circuit Court of Appeals

For the Ninth Circuit.

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FANCHON & MARCO, INC., a Corporation,  
Appellant,

vs.

HAGENBECK-WALLACE SHOWS COMPANY,  
a Corporation,

Appellee.

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Transcript of Record

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Upon Appeal from the District Court of the United  
States for the Southern District of California,  
Central Division

FILED

JUN - 3 1941

PAUL P. O'BRIEN,  
CLERK



No. 9779

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Circuit Court of Appeals  
For the Ninth Circuit.

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Upon Appeal from the District Court of the  
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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## NAMES AND ADDRESSES OF ATTORNEYS

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For Appellee:

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LEE COMBS, Esq.,  
THOMAS F. MURPHINE, Esq.,  
JOHN F. REDDY, Esq.,  
925 Pacific Southwest Building,  
Los Angeles, California. [1\*]

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\*Page numbering appearing at foot of page of original certified Transcript of Record.

In the United States District Court in and for the  
Southern District of California, Central Division

No. 658—M Civil

HAGENBECK-WALLACE SHOWS COMPANY,  
a Corporation,

Plaintiff,

vs.

FANCHON & MARCO, INC., a Corporation,  
Defendant.

## COMPLAINT

For Damages for Breach of Contract

Comes now plaintiff and for cause of action complains and alleges as follows:

### I.

That plaintiff is a corporation duly organized and existing under and by virtue of the laws of the State of Indiana, authorized and licensed to do business in the State of California; that defendant is a corporation, duly organized and existing under and by virtue of the laws of the State of California, authorized and licensed to do business and doing business in the County of Los Angeles, State of California.

### II.

That plaintiff is a corporation incorporated under the laws of the State of Indiana and defendant is a corporation incorporated under the laws of the State of California; that the matter in controversy

herein exceeds, exclusive of interest and costs, the sum of Three Thousand (\$3000.00) Dollars.

### III.

That on the 22nd day of May, 1939, plaintiff and defendant entered into a written contract, the terms of which are more particularly set forth in Exhibit "A" attached hereto and made a part hereof as if set forth verbatim herein. [2]

### IV.

That plaintiff has at all times done and performed all of the stipulations, conditions and agreements stated in said contract to be performed on its part at the time and in the manner therein specified; that in connection therewith on the 23rd day of May, 1939 at its own expense, plaintiff delivered from Baldwin Park, California, and turned over to defendant all of the property described in Paragraph 1 of Exhibit "A" attached hereto, in good condition, ready for use, at the City of Inglewood, State of California; that defendant at said time accepted said property and thereafter commenced the operation of "The Great American Circus" throughout the State of California as in said contract provided; that thereafter on or about May 31, 1939, defendant returned said property to the grounds of plaintiff at Baldwin Park, California, and refused to further continue operation of "The Great American Circus"; that plaintiff made every endeavor during the remainder of the term of said contract, to let said property to others but was un-

able so to do; that plaintiff fed and cared for the animals and equipment for a period of four (4) weeks at a cost to plaintiff of Four Hundred (\$400.00) Dollars per week or a total of Sixteen Hundred (\$1600.00) Dollars.

#### V.

That defendant has failed and refused and still fails and refuses to perform said contract on its side, and in particular in connection therewith has failed and refused to pay in cash on delivery of said property to defendant at Inglewood, California, the sum of Twenty-five Hundred (\$2500.00) Dollars, and failed to deliver the four certain promissory notes referred to in Paragraph V of said Exhibit "A" attached hereto, at the time and place stated in said contract as required for the delivery thereof, to-wit, Inglewood, California, on the 23rd day of May, 1939. [3]

#### VI.

That by reason of the default of defendant in the terms and conditions of the contract and agreement by and between the parties hereto, plaintiff has been damaged in the sum of \$12,809.14 comprising the sum of \$2500.00 cash due and unpaid on the 23rd day of May, 1939, together with interest thereon at the rate of 7% from the 23rd day of May, 1939, to and until the date of the filing of this suit, being the sum of \$2,569.02; the sum of \$2500.00 due and payable on the 31st day of May, 1939, together with interest thereon at the rate of 7% to and until the date of the filing of this suit, being the sum of \$2,-

565.13; the sum of \$2500.00 due and payable on the 7th day of June, 1939, together with interest thereon at the rate of 7% per annum to and until the date of the filing of this suit, being the sum of \$2,561.73; the sum of \$2500.00 due and payable on the 14th day of June, 1939, together with interest thereon at the rate of 7% to and until the date of the filing of this suit, being the sum of \$2,558.33; and the sum of \$2500.00 due and payable on the 21st day of June, 1939, together with interest thereon at the rate of 7% to and until the date of the filing of this suit, being the sum of \$2,554.93; and the sum of \$66.00 paid by plaintiff herein for defendant for insurance, as particularly provided under the terms and conditions of paragraph 12 of Exhibit "A" attached hereto.

## VII.

That although repeated demand has been made for the payment of the sums of money due plaintiff under the terms and conditions of its contract with defendant herein, as particularly set forth hereinbefore, no part thereof has been paid and the whole thereof is past due, owing and unpaid.

For a second, separate and distinct cause of action, plaintiff herein complains and alleges as follows:

## I.

Realleges and restates all the allegations contained in [4] Paragraph I to VII inclusive of its First Cause of Action, and makes the same a part hereof as if set forth verbatim herein.



## II.

That within two years last past, defendant was indebted to the plaintiff in the sum of \$15,475.14 for rentals due by defendant to plaintiff and for monies advanced by plaintiff for and on behalf of defendant; being so indebted, the defendant in consideration thereof then and there promised the plaintiff to pay it the said sum of money on request.

## III.

That the defendant although requested, has not paid the same or any part thereof to the plaintiff, but refuses to do so.

For a Third, separate and distinct cause of action, plaintiff herein complains and alleges as follows:

## I.

Realleges and restates all the allegations contained in Paragraphs I to VII inclusive of its First Cause of Action, and makes the same a part hereof as if set forth verbatim herein.

## II.

That within two years last past defendant was indebted to the plaintiff in the sum of \$15,475.14 upon an open book account, and being so indebted defendant in consideration thereof then and there agreed and promised plaintiff to pay it the said sum of money on request.

## III.

That defendant though requested, has not paid the same or any part thereof to the plaintiff, but refuses to do so.

Wherefore, plaintiff prays judgment against defendant for the sum of \$15,475.14, with interest as allowed by law, for costs of suit, and for such further relief as to the Court seems meet and just.

COMBS & MURPHINE,  
By LEE COMBS,  
Attorneys for Plaintiff. [5]

State of California,  
County of Los Angeles—ss.

Lee Combs, being by me first duly sworn, deposes and says: that he is one of the attorneys for plaintiff in the above entitled action; that he has read the foregoing Complaint—for damages for breach of contract and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it be true that the reason why said Complaint is not verified by an officer of plaintiff corporation is that its place of business is in the State of Indiana and that none of its officers are now within the County of Los Angeles, State of California, where affiant resides.

LEE COMBS.

Subscribed and sworn to before me this 10 day of November, 1939.

(Seal) JESSIE WOODRUFF,  
Notary Public in and for the County of Los Angeles, State of California. [6]

## EXHIBIT "A"

Agreement made this 22 day of May, 1939 between The Hagenbeck-Wallace Shows Company, a corporation organized and existing under the laws of Indiana, hereinafter referred to as "Lessor" and Fanchon & Marco, Inc., a corporation organized and existing under the laws of California, hereinafter referred to as "Lessee",

Witnesseth:

1. The Lessor hereby leases to the Lessee, and the Lessee hereby hires from the Lessor the following property:

One circus train consisting of seven flat cars, two stock cars, two coaches and two sleepers; big top seats, ring curbs; rails; chandeliers; ticket boxes; one air caliope; blocks, falls and cables; one public address system; cash registers; one concession department complete with stands, counters, etc.; twenty circus wagons; stake drivers, howdahs; complete wardrobe for animals and performers; reserved seats for big top including chairs and blue plank seats for end sections; side show platforms; one 25 kilowatt light plant and booster on wagon; ten elephants, twelve ponies, six dogs (collies), one bucking mule, four camels, and one orangoutang, together with harness and trappings for the animals,

all of which property is now stored and quartered at Baldwin Park, California.



2. This lease is for a term of five weeks beginning May 24, 1939, with an option to the Lessee to renew the same at the end of said term of five weeks for successive periods of one week each, but not to extend beyond August 16, 1939, upon the same terms and conditions as herein stated. Said option shall be exercised by the Lessee by giving written notice thereof, either by letter or telegram, addressed to the Lessor, during the last week of said term of five weeks and during each week thereafter.

3. The Lessor shall, at its own expense, deliver all of the foregoing property, in good condition and ready for use, to the Lessee at Inglewood, California, by May 23, 1939.

4. The said property shall be used by the Lessee in connection with its operation of a circus under the name of "The Great American Circus" and for no other purpose. Such use thereof is hereby restricted to the State of California and none of said [7] property shall be removed from or used outside of the State of California without the Lessor's written consent thereto being first given.

5. The rental for said term of five weeks beginning May 24, 1939 shall be \$12,500 which shall be paid as follows: \$2,500 in cash on the delivery of said property to the Lessee at Inglewood, California, and \$10,000 by the delivery to the Lessor at the same time of the Lessee's four promissory notes, each for \$2,500, the first of said four notes to be payable May 31, 1939, the second note to be payable June 7, 1939, the third note to be payable June 14,

1939, and the fourth note to be payable June 21, 1939. All of said notes shall be payable at the main office of the Bank of America at Los Angeles, California. In the event that the Lessee shall exercise its option to renew this lease, the Lessee shall pay to the Lessor each week for the use of said property the sum of \$2,500 in cash for each and every week of such renewal, until the property shall have been returned by the Lessee.

6. If default shall occur in the punctual payment of any of said promissory notes, or in payment of any other obligation of the Lessee hereunder, or in the performance of any of the conditions herein on the part of the Lessee to be performed, all of the said promissory notes, without previous notice or demand, shall, at the option of the Lessor, become and be immediately due and payable, and the Lessor shall have the right immediately to terminate this lease, and thereupon said lease shall be at an end as fully as if it had expired by limitation, and the Lessor shall have the right to enter upon the premises where said property or any of it is stored or kept and take possession thereof and of every part thereof, by force or otherwise, without being liable to prosecution or damages therefor, and shall have the right to retain all payments and promissory notes which up to that time may have been made and delivered under any of the provisions of this agreement. [8]

7. The Lessor warrants that all of the said property is free and clear of liens, encumbrances or valid claims of ownership of any person or persons what-

soever, and that it has full power and right to lease the same.

8. ~~The Lessee has examined the said property and the Lessor makes no representation as to its condition or fitness for the use thereof intended by the Lessee.~~ [WPD JP.]

9. All increase of animals by birth shall be and remain the property of the Lessor.

10. The Lessee hereby assumes all risks in the use and operation of the said property and will hold the Lessor harmless from any and all claims arising out of or by reason of the Lessee's use and operation of said property.

11. The Lessee shall take good care of all of said property and shall provide all necessary veterinarian services and medicines for the animals. At the expiration of this lease the Lessee shall, at its own expense, return and deliver to the Lessor, at Baldwin Park, California, all of the said property, as well as any increase thereof, in the same condition in which it was delivered by the Lessor, reasonable wear and tear excepted.

12. The Lessor agrees to procure a policy or policies of insurance in the amount of \$30,000 to cover the said property against the risks of fire, lightning, collision or derailment of railroad cars, overturning of trucks or wagons and stranding, sinking, burning or collision with another vessel while on ferries or in cars on transfers in connection therewith, for a period of four months, and the Lessee agrees to pay to the Lessor, upon demand, the amount of the premium charged for such insurance but not to exceed three hundred dollars.

In the event that the Lessee shall not use the property hereby leased for said period of four months, the Lessor shall, after the Lessee shall have returned all of said property to the Lessor at Baldwin Park, California, relinquish to the Lessee all [9] interest in the said policy so that the Lessee may recover the unearned premium thereon.

13. The Lessor and its agents shall at all times have the right to enter upon any premises occupied by the Lessee for the purpose of inspecting and examining the property hereby leased.

14. The Lessee shall not assign this agreement or sublet the said property or any portion thereof.

15. Within one week from the date hereof, the Lessee will, at its own expense, deliver to the Lessor a bond of a surety company, satisfactory to the Lessor, in the sum of \$30,000 conditioned upon the return by the Lessee to the Lessor, at the expiration of this lease, of all of the property hereby leased, as well as any increase thereof, in the same condition in which it was delivered by the Lessor, reasonable wear and tear excepted.

In Witness whereof, the parties have caused their respective corporate seals to be affixed and these presents to be executed by their respective corporate officers, the day and year first above written.

(Seal Affixed) THE HAGENBECK-WALLACE SHOW COMPANY,

(Signed) By W. P. DUNN, JR.,  
Sect'y & Treas.

(Seal Affixed) FANCHON & MARCO,  
INC.,

(Signed) By J. A. PARTINGTON,  
President. [10]



State of New York,  
County of New York,  
City of New York—ss.

On the 22nd day of May, 1939, before me came W. P. Dunn, Jr., to me known, who, being by me duly sworn, did depose and say that he resides at 311 Gregory Ave., West Orange, N. J., that he is Secy.-Treas. of The Hagenbeck-Wallace Shows Company, the corporation described in, and which executed, the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

(Signed) SAMUEL SHAYON,  
Notary Public.

Commission expires March 30, 1940.

State of New York,  
County of New York,  
City of New York—ss.

On the 22nd day of May, 1939, before me Jack A. Partington, to me known, who, being by me duly sworn, did depose and say that he resides at 400 Park Ave., N. Y., that he is the President of Fanchon & Marco, Inc., the corporation described in, and which executed, the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Di-

rectors of said corporation, and that he signed his name thereto by like order.

(Signed) SAMUEL SHAYON,  
Notary Public.

Commission expires March 30, 1940.

[Endorsed]: Filed Nov. 10, 1939. [11]

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[Title of District Court and Cause.]

### ANSWER

In defense of plaintiff's claim (designated causes of action in plaintiff's complaint), defendant alleges:

#### First Defense

The complaint fails to state a claim against defendant upon which relief can be granted.

#### Second Defense

Defendant admits the allegations contained in paragraphs I, II, and III; and denies each and every other allegation in the complaint, except that in paragraph I of plaintiff's Second and Third Claim, defendant admits the paragraphs realleged from plaintiff's First Claim which defendant heretofore admitted.

#### Third Defense

##### I.

That the consent of this defendant to the making, entering into and execution of that certain agreement referred to in the complaint dated the 22nd

day of May, 1939, a copy of which is attached to the complaint marked "Exhibit A", was not free, and the apparent consent of this defendant thereto was obtained through and by means of actual fraud on the part of said plaintiff.

## II.

That the actual fraud on the part of said plaintiff by [12] which the apparent consent of this defendant to said contract was obtained, consisted in the following acts committed by the plaintiff with intent to deceive this defendant, and to induce it to enter into said contract, to-wit:

(a) That said plaintiff knowing that defendant intended to use immediately all of the equipment described in said contract for and in connection with the operation of a circus, under the name of the Great American Circus, and knowing that the defendant had entered into certain written contracts with various parties for the performance of said circus in various places, suppressed from the defendant information or knowledge that said equipment was not in good condition and ready for use for the purpose for which intended as aforesaid, and that certain of said equipment was not available for delivery to the defendant, and that other portions were incomplete, the said plaintiff did then and there have knowledge or belief of the fact that said equipment was not in good condition and ready for use, and some of which was not available for delivery and some of which was incomplete, and

(b) Said plaintiff in said contract promised and agreed

“The Lessor shall, at its own expense, deliver all of the foregoing property, in good condition and ready for use, to the Lessee at Inglewood, California, by May 23, 1939.”

and said promise was so made by the plaintiff without any intention of performing it.

### III.

That the actual fraud on the part of plaintiff, as herein alleged, was perpetrated by said plaintiff with the intent and for the purpose of deceiving this defendant, and of inducing this defendant to enter into the said contract and transactions. That the defendant relied upon the acts and fraudulent misrepresentations of the plaintiff herein alleged, and in reliance thereon consented to and entered into and executed the said contract. That the said [13] equipment was not in fact in good condition and ready for use, but was defective, badly in need of repair and reconditioning, and was deficient, and certain parts thereof were missing, and other parts were incomplete, in the following particulars:

15 wagons were in need of complete overhauling, having flat wheels, bad wheel boxings, bent axles and many wagons were without brakes, making operation extremely difficult and dangerous;

Tent rigging, blocks, falls, chairs, all unsafe and constituting a great hazard to the public and employees;



Train flat decks and runs in unusable condition;

The calliope broken down and entirely unfit for use;

The elephant howdahs, either not in plaintiff's possession or unfit for use and consequently never delivered;

Wardrobe incomplete, and that which was delivered in bad condition and much of it unusable;

Sleeping cars without blankets, sheets, berth curtains or pillow cases.

That had the defendant known of the defective character of said equipment, and that much of said equipment was incomplete and large portions entirely missing, as herein alleged, it would not have entered into said contract.

#### IV.

That on or about the 31st day of May, 1939, and after this defendant had obtained possession of part of the equipment described in said contract, and attempted to use the same, this defendant for the first time learned and discovered the permanent defective character of certain equipment and of its need of repair and reconditioning, as herein set forth, and did thereupon redeliver all of said equipment to the plaintiff and gave written notice to the plaintiff of its rescission of said contract, a copy of which written notice of rescission is attached hereto marked "Exhibit A", and made a part hereof. [14]

## Fourth Defense

## I.

That after the making and execution of the contract referred to in plaintiff's complaint, a copy of which is attached thereto, marked "Exhibit A" and made a part thereof, the consideration for the obligation of this defendant under said contract failed in whole or in part through the fault of the plaintiff.

## II.

That the failure of consideration for the obligation of this defendant consisted in the following:

That under the terms of said contract the plaintiff, designated therein as Lessor, covenanted and agreed as follows:

"The Lessor shall, at its own expense, deliver all of the foregoing property, in good condition and ready for use, to the Lessee at Inglewood, California, by May 23, 1939."

That said plaintiff knew at the time of the execution of said contract that defendant contemplated the immediate use of said equipment for the purpose of the conduct and operation of a circus, under the name of the Great American Circus, and that it had obligated itself by written contract with various sponsors to immediately produce the circus. That the said plaintiff did not deliver all of the said equipment, described in said contract with this defendant, and that which was delivered was not in good condition and ready for use by May 23, 1939, in that the said equipment was defective, badly

in need of repair and reconditioning, and in particular the following deficiencies existed:

15 wagons were in need of complete overhauling, having flat wheels, bad wheel boxings, bent axles and many wagons were without brakes, making operation extremely difficult and dangerous;

Tent rigging, blocks, falls, chairs, all unsafe and constituting a great hazard to the public and employees;

Train flat decks and runs in unusable condition; [15]

The calliope broken down and entirely unfit for use;

The elephant howdahs, either not in plaintiff's possession or unfit for use and consequently never delivered;

Wardrobe incomplete, and that which was delivered in bad condition and much of it unusable;

Sleeping cars without blankets, sheets, berth curtains or pillow cases.

### III.

That shortly after taking possession of said equipment, the defendant for the first time ascertained the defective character of the equipment and the fact that it was not in good condition and ready for use, in the particulars hereinabove set forth, and that certain of said equipment was missing, and did thereupon on or about May 31, 1939, rede-

liver all of said equipment to the plaintiff and gave to the plaintiff written notice of its rescission of said contract of May 22, 1939, a copy of said written notice of rescission being hereto attached, marked "Exhibit A", and made a part hereof.

#### IV.

That the failure of consideration for the obligation of this defendant was occasioned wholly by and through the fault of the plaintiff, and plaintiff could have prevented said failure of consideration by diligently correcting the defects in said equipment, repairing and reconditioning the same and placing it in good condition and ready for use, and by supplying such equipment as was missing.

#### Fifth Defense

##### I.

That at the time of the making and execution of the contract referred to in plaintiff's complaint, a copy of which is attached thereto marked "Exhibit A", defendant informed plaintiff that it proposed to use the equipment described in said contract in the immediate production of a circus, under the name of the [16] Great American Circus, and that it had made contracts and proposed to make additional contracts with sponsors on whose behalf it would produce such circuses, and that the same would be used for such purposes during the period of said contract, and that such hiring of said equipment under the terms of said contract was for such purposes.

## II.

That the said plaintiff failed and refused to put the equipment, described in said contract, in a condition fit for the purpose for which it was let by plaintiff to defendant, and in particular failed to correct defects, and items requiring repair in the following particulars:

15 wagons were in need of complete overhauling, having flat wheels, bad wheel boxings, bent axles and many wagons were without brakes, making operation extremely difficult and dangerous;

Tent rigging, blocks, falls, chairs, all unsafe and constituting a great hazard to the public and employees;

Train flat decks and runs in unusable condition;

The calliope broken down and entirely unfit for use;

The elephant howdahs, either not in plaintiff's possession or unfit for use and consequently never delivered;

Wardrobe incomplete, and that which was delivered in bad condition and much of it unusable;

Sleeping cars without blankets, sheets, berth curtains or pillow cases.

## III.

That the defects and deteriorations herein described were not occasioned by the fault of this de-



fendant, and were not the result of the natural use by this defendant, but said defects existed at the time of the delivery of said equipment by the plaintiff to the defendant. [17]

## COUNTERCLAIM

### I.

That plaintiff and defendant entered into a written contract, a copy of which is attached to plaintiff's complaint and marked "Exhibit A". That by the terms of said contract, defendant agreed to lease from plaintiff for an agreed rent, certain equipment which was to be used by the defendant for the express purpose of conducting a circus. That the plaintiff agreed to deliver said equipment to defendant in good condition and ready for use.

### II.

That plaintiff failed and refused to comply with the terms of said agreement in that the said equipment was not in good condition, but was wholly inadequate for the purpose intended to be made thereof by the defendant as contemplated by the contract, and that the plaintiff failed and refused to deliver all of the equipment as specified in said contract.

### III.

That because of the failure of the plaintiff to comply with the covenants contained in said con-

tract, the defendant was unable to operate the circus as contemplated by the parties. That the equipment was in such a dangerous condition that it was hazardous for the employees to use said equipment, and to the members of the public who were in attendance upon performances wherein the said equipment was used. That because of such deficiencies and because of the condition of the equipment it became necessary for defendant to discontinue the operation of the circus, whereupon defendant re-delivered all of said equipment theretofore delivered to it to the plaintiff; and defendant was, therefore, wholly deprived of any use or benefit from the subject matter of said contract and was prevented from complying with its terms.

#### IV.

That in reliance upon plaintiff's performance and with [18] the knowledge of plaintiff, defendant entered into certain written contracts with third parties wherein defendant agreed to produce a circus which was to be sponsored by said third parties. That because of plaintiff's breach as aforesaid, defendant was prevented from performing said contracts and became liable in damages to said third parties in amounts as yet not fully ascertained. That when said amount of damages are ascertained, defendant will respectfully ask leave of court to amend *it's* counterclaim to insert the same.

## VI.

That due to the condition of the equipment as aforesaid, it was necessary for defendant to expend the sum of Two Thousand Five Hundred Dollars (\$2,500.00) for repairs and replacements of missing articles which plaintiff agreed to furnish. That all of the repairs made by defendant were not attributable to ordinary wear and tear, but were made in an attempt to put said equipment in a good and usable condition.

## VII.

That by reason of plaintiff's breach in failing and refusing to comply with the terms of the agreement as aforesaid, defendant has been damaged to the extent of Fifty Thousand Dollars (\$50,000.00) as loss of profits from the operation and use of the equipment as agreed to be furnished by plaintiff.

Wherefore, defendant demands:

1. That plaintiff be awarded no relief under its complaint;
2. That defendant have judgment in the sum of Fifty-Two Thousand Five Hundred Dollars (\$52,500.00), and such further damages as may be ascertained;
3. *It's* costs in said action.

MacFARLANE, SCHAEFER,  
HAUN & MULFORD

By HENRY SCHAEFER, JR., and  
JAMES H. ARTHUR, and  
WILLIAM GAMBLE,  
Attorneys for defendant. [19]



“EXHIBIT A”

NOTICE OF RESCISSION

To: Hagenbeck-Wallace Shows Company,  
a corporation

You Will Please Take Notice that the undersigned, Fanchon & Marco, Inc., a corporation, hereby rescinds and terminates that certain agreement of lease entered into between the said undersigned and you on the 22nd day of May, 1939, wherein and whereby certain circus equipment therein described was purportedly leased to the undersigned by you.

This rescission is made on the ground that the consideration for this obligation has failed in a material respect, and particularly because the equipment set forth in said lease agreement was not at the time of the delivery of said equipment to the Lessee, or now, in proper form or order to use in the manner for which it was intended to be used, and such use up to date has been had only by the expenditure of large sums of money by the Lessee; said defects being as follows:

15 wagons being in need of complete overhauling, having flat wheels, bad wheel boxings, bent axles and many wagons without brakes, thus making operation extremely difficult and dangerous;

Tent rigging, blocks, falls, chairs, all unsafe and constituting a great hazard to the public;

Train flat decks and runs in unusable condition;

In addition the Calliope does not operate;

Elephant howdahs never delivered;

Wardrobe incomplete, and that which was delivered was in bad condition;

Sleeping cars without blankets, sheets, berth curtains or pillow cases.

These items and others have caused delays, resulting in losses estimated to be \$6000.00, and in repairs spent to date in excess of \$2000.00, and causing the Lessee to become liable to suits for unfulfilled contracts.

The Lessee herewith tenders and returns to you all the equipment that it has procured delivered at your premises.

Yours truly,

FANCHON & MARCO, INC.

By J. A. PARTINGTON

President

[Endorsed]: Filed Dec. 7, 1939. [20]

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[Title of District Court and Cause.]

### REPLY TO COUNTERCLAIM

Plaintiff for its reply to the counterclaim contained in defendant's Answer to the Complaint herein, says:

#### First Defense

##### I.

Plaintiff admits the allegations contained in Paragraph I of defendant's counterclaim.

II.

That plaintiff has no knowledge or information sufficient to form a belief concerning the allegation contained in Paragraphs IV and VI of defendant's counterclaim.

III.

Plaintiff denies each and every allegation contained in Paragraphs II and III and VII of defendant's counterclaim, except that in Paragraph III of defendant's counterclaim plaintiff admits that said equipment was redelivered to plaintiff herein on or about the 31st day of May, 1939.

Second Defense

I.

That said counterclaim fails to state facts sufficient to constitute a counterclaim against plaintiff upon which relief can be granted. [21]

Third Defense

I.

That defendant is estopped from maintaining this counterclaim by reason of its conduct in itself being in default upon a dependent and concurrent obligation, in that defendant failed and refused to make payment of \$2500.00 upon delivery of said equipment as provided for in the contract, and further failed and refused to deliver any of the notes as in said contract provided.

## Fourth Defense

## I.

That defendant is estopped from maintaining this counterclaim for damages for repair by reason of its conduct in not giving plaintiff such notice as required by Section 1957 of the Civil Code of California.

## Fifth Defense

## I.

That defendant is estopped from maintaining this counterclaim for damages for breach of said contract by reason of its conduct in rescinding and terminating said contract in writing, as set out in the Third Defense of defendant's Answer as Exhibit "A", on file herein.

Wherefore, plaintiff demands that defendant be awarded no relief under its counterclaim and that plaintiff have judgment as prayed for in its complaint.

COMBS &amp; MURPHINE

By THOS. F. MURPHINE,

Attorneys for plaintiff.

[Endorsed]: Filed Dec. 19, 1939. [22]

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[Title of District Court and Cause.]

## AMENDED COUNTERCLAIM

Now comes the defendant, Fanchon & Marco, Inc., and by leave of Court first had, files this its Amended Counterclaim, and alleges as follows:

## I.

That plaintiff and defendant entered into a written contract, a copy of which is attached to plaintiff's complaint and marked "Exhibit A". That by the terms of said contract, defendant agreed to lease from plaintiff for an agreed rent, certain equipment which was to be used by the defendant for the express purpose of conducting a circus. That the plaintiff agreed to deliver said equipment to defendant in good condition and ready for use.

## II.

That plaintiff failed and refused to comply with the terms of said agreement in that the said equipment was not in good condition, but was wholly inadequate for the purpose intended to be made thereof by the defendant as contemplated by the contract, and that the plaintiff failed and refused to deliver all of the equipment as specified in said contract.

## III.

That because of the failure of the plaintiff to comply with the covenants contained in said contract, the defendant was [23] unable to operate the circus as contemplated by the parties. That the equipment was in such a dangerous condition that it was hazardous for the employees to use said equipment, and to the members of the public who were in attendance upon performances wherein the said equipment was used. That because of such deficiencies and because of the condition of the equipment it became



necessary for defendant to discontinue the operation of the circus, whereupon defendant redelivered all of said equipment theretofore delivered to it to the plaintiff; and defendant was, therefore, wholly deprived of any use or benefit from the subject matter of said contract and was prevented from complying with its terms.

#### IV.

That in reliance upon plaintiff's performance and with the knowledge of plaintiff, defendant entered into certain written contracts with third parties wherein defendant agreed to produce a circus which was to be sponsored by said third parties. That because of plaintiff's breach as aforesaid, defendant was prevented from performing said contracts and became liable in damages to said third parties in amounts as yet not fully ascertained. That when said amount of damages are ascertained, defendant will respectfully ask leave of court to amend *it's* counterclaim to insert the same.

#### V.

That immediately upon discovering that the equipment furnished by the plaintiff was not in good condition and ready for use in compliance with the terms of the contract between the plaintiff and defendant, the defendant notified the plaintiff that said equipment was not in good condition and ready for use and specified the particulars wherein said deficiencies and need of repairs in said equipment



existed. That thereupon the defendant was informed by the plaintiff, through its agents, that the defendant should assume to make such repairs and additions as were necessary to restore the equipment in such a condition as to comply with the [24] terms of the contract. That thereupon this defendant proceeded to make necessary repairs and additions to said equipment and expended therefor the sum of Two Thousand Five Hundred Dollars (\$2,500.00). That although defendant expended the sum as aforesaid, it was impossible for this defendant to restore the equipment in a condition suitable for use for the purpose for which it was intended, and that it was necessary in consequence that defendant return said equipment and rescind the contract as hereinbefore alleged.

## VI.

That by reason of plaintiff's breach in failing and refusing to comply with the terms of the agreement as aforesaid, defendant has been damaged to the extent of Fifty Thousand Dollars (\$50,000.00) as loss of profits from the operation and use of the equipment as agreed to be furnished by plaintiff.

Wherefore, defendant demands:

1. That plaintiff be awarded no relief under its complaint;
2. That defendant have judgment in the sum of Fifty-Two Thousand Five Hundred Dollars (\$52,500.00), and such further damages as may be ascertained;

3. *It's* costs in said action.

MacFARLANE, SCHAEFER,  
HAUN & MULFORD

By HENRY SCHAEFER, JR. and  
JAMES H. ARTHUR and  
WILLIAM GAMBLE,  
Attorneys for defendant.

[Endorsed]: Filed Nov. 23, 1940. [25]

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[Title of District Court and Cause.]

REPLY TO AMENDED COUNTERCLAIM

Plaintiff for its reply to the amended counterclaim contained in defendant's amended counterclaim on file herein, says:

First Defense

I.

Plaintiff admits each and several the allegations contained in Paragraph I of the amended counterclaim.

II.

Denies each and several all the allegations contained in Paragraphs II, III and IV of said amended counterclaim, excepting that this plaintiff admits that defendant deposited and left at Baldwin Park, California, on or about June 1st, 1939, all of the equipment referred to in Exhibit "A" attached to plaintiff's complaint on file herein.

## III.

Answering Paragraph V, this plaintiff admits that certain minor repairs were made by plaintiff on said equipment; admits that certain minor repairs were made by defendant on said equipment with the understanding that plaintiff reimburse for same; alleges that all of said repairs were of a minor nature; deny each and several all the remaining allegations in said Paragraph V contained.

## IV.

Denies each and several all the allegations contained in Paragraph VI of said amended counterclaim. [26]

## Second Defense

## I.

That said amended counterclaim fails to state facts sufficient to constitute a counterclaim against plaintiff upon which relief can be granted.

## Third Defense

## I.

That defendant is estopped from maintaining this counterclaim by reason of its conduct in itself being in default upon a dependent and concurrent obligation, in that defendant failed and refused to make payment of \$2500.00 upon delivery of said equipment as provided for in the contract, and further failed and refused to deliver any of the notes as in said contract provided.

## Fourth Defense

## I.

That defendant is estopped from maintaining this amended counterclaim for damages for repair by reason of its conduct in not giving plaintiff such notice as required by Section 1957 of the Civil Code of California.

## Fifth Defense

## I.

That defendant is estopped from maintaining this amended counterclaim for damages for breach of said contract by reason of its conduct in rescinding and terminating said contract in writing, as set out in the Third Defense of defendant's Answer as Exhibit "A" on file herein.

## Sixth Defense

## I.

That upon the facts as alleged in said amended counterclaim, defendant is not entitled to recover \$50,000.00 or any sum whatsoever as loss of profits from the operation and use of the equipment referred to, or otherwise, in connection with the contract referred [27] to herein or at all, by reason of its attempting to stand upon a rescission of the contract in this case, and that said defendant cannot recover both on rescission and on breach of contract.

## Seventh Defense

## I.

That the equipment referred to in the contract set forth in plaintiff's complaint in this action was

selected, inspected and examined by defendant itself before execution of the contract referred to herein and the specific items referred to in said contract were all known to and examined by defendant before execution of the contract, and that said equipment was accepted in the condition, quantities, amounts and description prior to its delivery at Inglewood, May 23, 1939.

Wherefore, plaintiff demands that defendant be awarded no relief under its Amended Counterclaim, and that plaintiff have judgment as prayed for in its complaint.

COMBS & MURPHINE

By LEE COMBS

Attorneys for plaintiff.

[Endorsed]: Filed Nov. 27, 1940. [28]

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[Title of District Court and Cause.]

ORDER ON PRETRIAL RULE No. 16.

Pursuant to citation for Pretrial under Rule 16, Lee Combs, Esq., attorney for the plaintiff Hadenbeck-Wallace Show Company, and Henry Schaefer, Esq., attorney for the defendant Fanchon & Marco, appeared in the chambers of this Court on this 14th day of November, 1940, at 10:30 a. m.

The Pretrial conference was opened by the undersigned Judge, and after discussion of the pleadings and the issues, it was stipulated by the attorneys, that the contract attached as Exhibit "A" to the



plaintiff's complaint was executed; there was sharp differences between the attorneys, as to the delivery of the property enumerated in the contract, and of the condition of the wagons, tent rigging, blocks, falls, chairs, or any of the other property including animals, wardrobes, sleeping cars, etc.; and after discussion between counsel and the Court, it was suggested by the Court, that this was one of the cases where it appeared the attorneys and their respective clients could compromise and settle the difference, composing the issue in this case, in a more satisfactory way than could the Court, and suggested to the attorneys that they undertake such conference with a view of reaching an amicable settlement. The attorneys expressed a willingness to undertake a compromise and settlement, and thereupon a further hearing was continued until the 18th day of November, 1940, at 10 o'clock a. m. at the Court's chambers for further Pretrial conference.

Dated this 14th day of November, 1940.

JEREMIAH NETERER,

U. S. District Judge.

[Endorsed]: Filed Nov. 15, 1940. [29]

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[Title of District Court and Cause.]

CERTIFICATE OF PRETRIAL HEARING  
UNDER RULE No. 16

Pursuant to adjournment of Pretrial herein on the 14th day of November, 1940, appeared Thomas



Murphine, Esq., and Lee Combs, Esq., attorneys for the plaintiff Hagenbeck-Wallace Shows Company, a corporation, and Henry Schaefer, Esq., Attorney for the defendant Fanchon & Marco, Inc., a corporation.

On opening of the conference the attorneys for the respective parties announced that they could not arrive at a compromise agreement, It was thereupon stipulated that the plaintiff is a corporation organized under the laws of the state of Indiana and licensed to do business in the State of California; that defendant is organized under the laws of the state of California and licensed to do business in said state; that the matter in controversy is in excess exclusive of interest and costs the sum of \$3000.00; that on the 22nd day of May, 1939, plaintiff and defendant entered into a written contract, the terms of which is set forth in Exhibit "A" attached to plaintiff's complaint; that on the 23rd day of May, 1939, the plaintiff delivered to the defendant properties described in said contract; that on the 31st day of May, 1939; the defendant returned said property to the plaintiff and a copy of the notice of rescission attached to the answer was delivered to plaintiff and the defendant refused to continue with the operation of the Great American Circus; the defendant admits that the \$2500.00 cash payment provided by the contract was not paid, but contends that said sum was expended in rehabilitation of the equipment delivered. Defendants admits that in addition to the \$2500.00 cash payment it agreed to give

to the *defendant* four notes of \$2500.00 each to be paid as alleged in the complaint together with interest thereon as therein provided; that demand has been made for the payment of the said sums and demand has been refused. It is agreed that the 2nd and 3rd causes of action are *predictated* upon the first and that failure of the first cause of action would defect the 2nd and 3rd causes of action; upon this stipulation it is ordered that the [31] 2nd and 3rd causes of action be dismissed. Exception is noted to the plaintiff.

It is agreed that the open issue is the condition of the equipment in that the 15 wagons had axels that were bent, and out of line, which caused them to burn; that it delayed putting up of the tent and caused the defendant to miss performance (i.e.) the mantinee in San Diego, and at Santa Ana and Pasadena; the Pasadena engagement was on Memorial Day. Delay at Pomona so that the mantinee could not begin until 4 o'clock instead of 2 o'clock, which in turn delayed the evening performance. The condition of the rope and lines are an open issue; likewise the missing of the elephant howdahs.

It is admitted that the sponsors contracts were executed by the person purporting to have executed the same, being 13 in number marked Exhibits Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and filed with the Clerk; that the San Diego contract is in form the same as Exhibit "3" and on the same terms. Exhibits 3, 4, 6, 7 & 8 were executed subsequent to the date of the delivery of the equipment at Inglewood;

Exhibit "3" on May 27th, and the other four on May 29th, 1939; that expense of maintaining the animals was \$400.00 a week; that the telegram sent on May 31st, 1939, marked Exhibit #14 is a copy of the telegram sent to the parties listed on Exhibit #14 and filed with the Clerk.

The issue will be limited to the condition of the equipment when delivered to the defendant and to losses, if any, recoverable that were occasioned by the deficiency of the equipment if any.

This statement to be read in evidence upon the trial thereof.

Dated this 25th day of November, 1940.

JEREMIAH NETERER,

U. S. District Judge.

[Endorsed]: Filed Nov. 25, 1940. [32]

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[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT OF ORAL  
FINDINGS OF THE COURT. [33]

Los Angeles, California,

Friday, November 29, 1940, 1:45 P.M.

The Court: The court adopts the certificate of facts filed in the pre-trial order as a part of the court's findings. The court further finds that, before executing the contract in issue, Clawson, the caretaker of plaintiff's circus at winter quarters at Baldwin Park, saw Nelson and one or two other

persons as well, and told them that the plaintiff would like to let some or all of its circus. Nelson took the matter up with the defendant, and thereafter, on the 22nd day of May, the contract was executed in New York by defendant's sponsor and the plaintiff pursuant thereto. The property described in the complaint of plaintiff is set forth in the contract attached thereto, by which the use of the property was leased to the defendant for the period of five weeks, at a rental of \$2500 per week.

This property had been used in the show business, some of it for a number of years. The ropes had been used for one or two years, perhaps two years. The defendant is familiar with the show business, and had been in such business for some time. He knew about the ropes, and must have known how long those ropes would likely continue in use. The defendant had in its employ a practical staff of efficient showmen, who had been engaged in the show business, some for many years. Some had been [34] employed by the defendant. Eagles and Nelson and Daillard were the defendant's special representatives in selecting, or at least looking over the property and paraphernalia for the defendant's use and the properties of the plaintiff at the winter quarters in Baldwin Park. From about 48 wagons, 15 wagons were finally selected. All of the property that was delivered and accepted at Inglewood was in good, usable condition. Some of it was in need of some repairs, which the defendant had made and charged to the plaintiff's



account, to be deducted from the first payment due the plaintiff. The railroad cars needed repairs to bring them within the Interstate Commerce requirements. These repairs were made to the cars, and after reconditioning, the cars were delivered at Inglewood. Nelson said all of the property named in the complaint was delivered except the howdahs. Nelson, who was in the defendant's employ, said they did not need the howdahs then, but knew where they were, and when needed he would get them, and that he, Nelson, was advised where they were and could receive them when he needed them. Eagles likewise was present at the receipt of this property, and he said they did not need them, and, if needed, knew where to get them.

All of the property was viewed by the defendant, through its agents. Everything was open and obvious. Nothing was concealed from them. The sleeping cars were old. They [35] had slat beds. There were no springs on the beds. Some of the pillows and sheets were gone. No blankets were furnished, but these were afterward purchased by defendant and charged to the plaintiff. These cars were not modern in any sense of the word, but their condition was fully exposed and known by the defendant, and the defendant saw the condition that the cars were in. A suggestion was made with relation to painting the cars, and the cars were painted, at plaintiff's cost. Something was said about the calliope. The calliope was delivered at Inglewood, but in unloading there is some testimony that it was

turned over, and it was afterwards removed to some other place by the defendant. There is no evidence that the calliope was impaired when it was delivered at Inglewood.

Something was said about the runways. The runways were in good condition. At one place where an exhibition was made one of the wagons did overturn. The testimony is that the runways should have been, or usually are, of steel, now. It is not material what the runways are, if they are safe. This runway was safe if it was supported by the under-support. There is no testimony that this runway was placed in the situation which its construction required. If the supports had been placed under it, it perhaps would not have broken, but if the runway was sufficient, with the support under it, then no complaint could be made.

The wagons in this case are shown to have been heavily [36] loaded, but that is neither here nor there. It is not shown that the heavy loading had anything to do with it, except that the wagon did overturn. I do not find from the evidence that that was due to the runway.

The defendant was advised by Austin, who was in its employ in a responsible position, and who was an old showman, that it would require at least a week or two weeks, I think perhaps he said two or three weeks, but a week or two weeks before the show would move smoothly and at all satisfactorily.

The ropes were examined by the defendant's representatives. A coil of 1500 feet was bought at In-



glewood by defendant on plaintiff's account. The defendant knew the time the ropes had been used. There is no evidence as to what use they had been placed to or what elements they had been exposed to, nor the continuous use to which they had been adopted. But all this was known to the defendant at the time.

The rope used at Pasadena broke. This was occasioned by the rope catching in the block fall, and when the tent was sought to be raised, they tried to raise it by elephant power, and when it faulted and the elephant pulled, the rope broke. This rope was then spliced, and was used in raising the tent.

No part of the broken rope is produced in court as evidence, nor is its absence explained. There is testimony [37] that the weakness in the rope was dry rot, but little weight can be attached to those statements, because a rope so afflicted could not be detected by a person merely looking at it, as the testimony shows these witnesses did. They had no special knowledge with relation to it. And the witness who spliced the rope testified in this case, but he did not say anything about any dry rot or any appearance at the broken place of the rope of any unusual condition. The non-production of that, of course, would indicate the contrary idea to the dry rot.

At the time of the breaking of the rope the man who was in charge of that department was an old showman. He was working in his line of business in making this exhibition. If that had broken because of dry rot, he would have discovered it, and

he would have reported it to the defendant, and a part of the rope, or the broken part, would have been saved as a matter of protection to the defendant. But this was not done.

At Santa Ana the distance from the station to the showgrounds was three and a half miles. The wagons were drawn by gas motor power. In moving the wagons from the railroad yards to the grounds the spindle on the hub of one of the wheels became heated. These wagons had been exhibited at Inglewood and San Diego, and there is no evidence that they had been greased or oiled at any time since the delivery of the wagons. The wagons were likewise, [38] I will not say overloaded, but they were loaded beyond the normal capacity that they usually bore. Heat in a spindle, it is common knowledge, is caused by friction, and a dry spindle will readily heat, but if greased or oiled the friction is eliminated, and heat will not be created.

Upon the organization of the show the defendant employed a staff of efficient showmen as heads of the several departments. The helpers, however, were not experienced men. They were what were known as green men at the work. They were unfamiliar with the business. And changes were made constantly by persons being in the employ leaving it and by taking on new men.

At Santa Ana the defendant was approached by a union labor organizer and asked to sign a closed shop contract. He did not do so, but this was postponed, and the request was renewed at Pasadena, but it was not signed. The organizer said that if it

was not signed in Pomona the show could not open at San Francisco, as he would call a strike, call out the men, that the defendant would not be permitted to show in San Francisco, where it was scheduled to be within a few days. The contract was not signed, and the show was closed.

The defendant then returned the property to the place where it had been received and gave notice of rescission of the contract. [39]

The defendant, during the week's performance or operation of the show, had a net loss of \$23,-323.93.

The conclusion from these facts: When the defendant accepted the property, after examination and after exposition of the property to him, without discovering any fault of any sort or fashion, and assumed to make reconditioning for such needed repairs as were apparent, and charged it to the plaintiff's account with the plaintiff's consent, he waived such reconditioning as is shown to have been necessary and to have been made, and may not, after operating the show for a week at a loss, as is shown, and when threatened with a closed shop by the labor unions at Pomona, and then closing the circus, and by his telegram, as is shown by the evidence, saying that the show will close because of labor conditions, the court cannot now say that he has been unfairly dealt with, and the findings and judgment will be in favor of the plaintiff, and it will recover the amount claimed in the complaint except \$400 for each week for four weeks animal food and except the defendant should be and will

be given credit for all of the sums which it expended upon rehabilitating any part of this show. From this exhibit which is in the case there should be eliminated the rental of stake driver, and garbage cans and hammer, the truck hire to Ted Ducey, dining car equipment, blacksmith equipment, the 120 yards of burlap, and an item of tools, being the next to the last item in this exhibit. You can total these items [40] and deduct that from the total amount, and you can prepare your decree. Unless formal findings are presented, these findings will be adopted as the court's findings in the case.

JEREMIAH NETERER

Judge.

[Endorsed]: Filed Dec. 2, 1940. [41]

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In the United States District Court in and for the  
Southern District of California, Central Division.

No. 658-M Civil

HAGENBECK-WALLACE SHOWS COMPANY,  
a corporation,

vs.

FANCHON & MARCO, INC., a corporation,  
Defendant.

### JUDGMENT

Be it remembered that this cause came on regularly for trial before the Honorable Jeremiah



Neterer, Judge presiding in the United States District Court in and for the Southern District, Central Division thereof at Los Angeles, California, jury having been waived by the parties hereto. The plaintiff Hagenbeck-Wallace Shows Company, a corporation appeared being represented by Combs and Murphine, Lee Combs, Thos. F. Murphine and John F. Reddy, Jr. its attorneys and the defendant Fanchon & Marco, Inc., a corporation appeared being represented by MacFarlane, Schaefer Haun & Mulford by Henry Schaefer Jr. and William Gamble its attorneys; the matter was duly and as by law provided after due and lawful notice thereof on for trial on November 14, 18, 22, 27, 28, 29, 1940 and evidence both oral and documentary having been presented by both plaintiff and defendant and received by the court in the above-entitled cause, and arguments of counsel on behalf of both of the parties hereto having been made by their respective attorneys and the same having been heard and considered by the court, and the court having made its findings and stated the same in its Certificate of Pretrial Hearing under Rule No. 16 and in its findings of fact transcribed herein by the reporter in the matter and duly adopted and made its findings by the court herein, further and other findings of fact and conclusions of law having been waived by attorneys for the respective parties [42] hereto in open court, and the court being fully advised in the premises.

Now *therefor* it is hereby ordered adjudged and decreed that plaintiff Hagenbeck-Wallace Shows Company have and recover of defendants Fanchon & Marco Inc. the sum of Fifteen Thousand, six dollars (\$15,006.07) and seven cents together with its costs of suit taxed herein in the sum of \$356.43 and the plaintiff have execution therefor.

Done in open Court this 3rd day of December 1940.

JEREMIAH NETERER

Judge of the United States  
District Court.

Approved as to form except that no findings are waived.

MacFARLANE, SCHAEFER,  
HAUN & MULFORD

By HENRY SCHAEFER, JR.

[Endorsed]: Judgment entered Dec. 3, 1940.  
Docketed Dec. 3, 1940. Book C. O. 4—Page 87.  
R. S. Zimmerman, Clerk. By Theodore Hocke, Deputy. [43]

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[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Clerk of the District Court of the United States, in and for the Southern District of California, Central Division:

Notice is hereby given that Fanchon & Marco, Inc., defendant above named, hereby appeals to the



Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this case on the 3rd day of December, 1940, and from the Order of said Court denying its motion for a new trial.

Dated: January 13th, 1941.

MacFARLANE, SCHAEFER,  
HAUN & MULFORD and  
JAMES H. ARTHUR and  
WILLIAM GAMBLE

By HENRY SCHAEFER, JR.

Attorneys for Fanchon &  
Marco, Inc.

1150 Subway Terminal Bldg.,  
Los Angeles, California.

Copy of foregoing Notice mailed to Combs & Murphine, Esqs., attorneys for plaintiff Jan. 16, 1941.

R. S. ZIMMERMAN,  
Clerk.

By E. L. S.,  
Deputy.

[Endorsed]: Filed Jan. 16, 1941. [44]

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National Automobile Insurance Co.

[Title of District Court and Cause.]

SUPERSEDEAS BOND

Know All Men by These Presents:

That we, Fanchon & Marco, Inc., a corporation, as Principal, and National Automobile Insurance

Company, a corporation organized and existing under and by virtue of the laws of the State of California, are held and firmly bound unto Hagenbeck-Wallace Shows Company, a corporation, in the above entitled suit in the penal sum of Twenty Thousand and no/100 Dollars (\$20,000.00), to be paid to the said Hagenbeck-Wallace Shows Company, their successors and assigns, which payment well and truly to be made, the National Automobile Insurance Company, bind itself, its successors and assigns, firmly by these presents.

Sealed with the corporate seal and dated this 16th day of January, 1941.

The condition of the above obligation is such that:

Whereas, the said Defendant, Fanchon & Marco, Inc., a corporation, in the above entitled suit has taken an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse a judgment rendered and entered on the 3rd day of December, 1940, by the District Court of the United States for the Southern District of California, Central Division, in the above entitled cause:

Now, Therefore, the condition of this bond is for the satisfaction of the judgment in full, together with costs, interests and damages for delay if for any reason the appeal is dismissed or if the judgment is affirmed, and to satisfy in full such modification of judgment and such costs, interests and damages as the appellate court may adjudge and award, and in case of default or contumacy on the

part of the principal or surety, the Court may, upon notice to them of not less than ten days, proceed summarily and render judgment against them, in accordance with their obligation and award execution thereon.

In Witness Whereof the corporate seal of said surety is hereby affixed and attested to by its duly authorized Attorney-in-Fact at Los Angeles, California, this 16th day of January, 1941.

[Seal] FANCHON & MARCO, INC.,

a corporation

By MARCO WOLFF V. P.

NATIONAL AUTOMOBILE IN-  
SURANCE COMPANY

By [Seal] R. L. TRAVISS

Attorney-in-Fact.

State of California,  
County of Los Angeles—ss.

On this 16th day of January A. D. 1941, before me, Margaret Murphy a Notary Public in and for the County and State aforesaid, duly commissioned and sworn, personally appeared R. L. Traviss, Attorney-in-Fact of the National Automobile Insurance Company, to me personally known to be the individual and officer described in and who executed the within instrument, and he acknowledged the same, and being by me duly sworn, deposes and says that he is the said officer of the Company

aforesaid, and the seal affixed to the within instrument is the corporate seal of said Company, and that the said corporate seal and his signature as such officer were duly affixed and subscribed to the said instrument by the authority and direction of the said corporation.

In Witness Whereof, I have hereunto set my hand and affixed my official seal at my office in the City of Los Angeles County of Los Angeles the day and year first above written.

[Seal] MARGARET MURPHY

Notary Public in and for the County of Los Angeles, State of California.

My Commission expires Dec. 23, 1942.

Examined and recommended for approval as provided in Rule 13.

HENRY SCHAEFER, JR.

Attorney for Defendant

I approve the foregoing dated Jan. 16, 1941.

PAUL J. McCORMICK

U. S. District Judge.

[Endorsed]: Filed Jan. 16, 1941. [45]

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[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

The Appellant herewith files its Designation of Record on Appeal and requests that the Clerk in-

clude for transmission to the Circuit Court of Appeals the following:

Complaint

Answer and Counter Claim of defendant

Reply of plaintiff to defendant's counter claim

Amended Counter Claim of defendant

Reply of plaintiff to Amended Counter Claim

Order on Pre Trial (filed Nov. 15, 1940)

Certificate of Pre Trial Hearing (filed Nov. 25, 1940)

Order of November 18th, Dismissing Second and Third Cause of action of plaintiff

Findings of Fact and Conclusions of Law, with the direction for the entry of judgment thereon—Reporter's trans. pp. 417-424

Judgment

Notice of Appeal with date of filing

Following Exhibits not included in the Order and Certificate on Pre Trial

Bills for repairs on Railroad cars from Santa Fe Railroad to defendant—photostats

All of the Reporter's Transcript

Dated: March 12, 1941.

MacFARLANE, SCHAEFER,

HAUN & MULFORD

JAMES H. ARTHUR and

WILLIAM GAMBLE

By HENRY SCHAEFER, JR.

Attorneys for Defendant



Received copy of the within Designation this 13 day of March, 1941.

COMBS & MURPHINE  
By THOS. F. MURPHINE  
Attorney for Plaintiff.

[Endorsed]: Filed Mar. 12, 1941. [47]

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[Title of District Court and Cause.]

AMENDED DESIGNATION OF RECORD ON  
APPEAL

The Appellant herewith files its Amended Designation of Record on Appeal and requests that the Clerk include for transmission to the Circuit Court of Appeals in addition to the record heretofore designated, all the exhibits admitted in evidence in said case.

Dated: March 13, 1941.

MacFARLANE, SCHAEFER,  
HAUN & MULFORD  
JAMES H. ARTHUR and  
WILLIAM GAMBLE  
By HENRY SCHAEFER, JR.  
Attorneys for Defendant

Received copy of the within Amended Designation of Record on Appeal this 13th day of March, 1941.

COMBS & MURPHINE  
Attorneys for Plaintiff.

[Endorsed]: Filed Mar. 13, 1941. [48]



[Title of District Court and Cause.]

ORDER EXTENDING TIME

On application of Henry Schaefer, Jr., and good cause appearing therefor,

It is hereby ordered that the time for filing the transcript on appeal, and the time in which the designation of the contents of the record on appeal may be filed, is extended to and including the 7th day of April, 1941.

Dated: February 11th, 1941.

PAUL J. McCORMICK

Judge of the District Court

[Endorsed]: Filed Feb. 11, 1941. [49]

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[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, R. S. Zimmerman, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages, numbered 1 to 49, inclusive, contain full, true and correct copies of the Complaint; Answer to Complaint; Reply to Counterclaim; Amended Counterclaim; Reply to Amended Counterclaim; Order on Pre-trial Rule No. 16; Order Dismissing Second and Third Causes of Action; Certificate of Pre-trial Hearing; Decision and Findings of Fact and Conclusions of Law; Judgment; Notice of Appeal; Bond on Appeal; Order for Transmittal of Ex-

hibits on Appeal; Designation of Contents of Record on Appeal; Amended Designation of Contents of Record on Appeal; and Order Extending Time to File Record on Appeal; which, together with the original Exhibits and the original Reporter's Transcript, transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I do further certify that the Clerk's fee for comparing, correcting and certifying the foregoing record amounts to \$8.70, which fee has been paid to me by the Appellant.

Witness my hand and the seal of said District Court, this 28th day of March, A. D., 1941.

[Seal]                      R. S. ZIMMERMAN,  
Clerk.

By EDMUND L. SMITH,  
Deputy Clerk. [50]

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[Title of District Court and Cause.]

Los Angeles, California,

Wednesday, November 27, 1940

### TESTIMONY

Mr. Combs: In connection with the amended counterclaim, although we are not certain that it is required under the rules of court, we deem it advisable to file an answer to the counterclaim, in case it should be construed as a cross-complaint.

The Court: It may be received.

Mr. Combs: I will come back to that matter in a moment. I want to make some further argument in connection with the [54] counterclaim, but at this time I would like to call the court's attention—

The Court: Let me see the counterclaim.

Mr. Combs: It is served now in connection with the memorandum of stipulations under the pre-trial rule. There are several matters that I would like to take up. Our information is that the matinee at San Diego took place on time, and that that at Pomona began at 3:00 o'clock, not 4:00 o'clock, as stated in the memorandum, and therefore counsel may disagree with me on that fact. Whatever the cause for it is, now, from our standpoint, that constituting a misstatement in the memorandum of the pre-trial, we would like to be relieved from such commitment, and ask that those matters may rest upon the proof. I think the proof will be very simple upon the subject.

The Court: There will be no proof upon the matter upon which the pre-trial certificate is filed. I understood at the pre-trial that that was the time agreed upon, and so did the clerk, and it was therefore certified. I don't know that that makes very much difference, however.

Mr. Combs: I want to call the court's attention to the fact that there are, according to our viewpoint, two erroneous facts, as just stated, in that connection, and there is a further erroneous fact that I know that I did not state, as the pre-trial memorandum has recited, to-wit, "That expense of

maintaining the animals was \$400 a month.” [55]  
I stated \$400 a week, if your Honor please.

The Court: Yes. You are right about that. The word “month” should be “week,” and it will be so amended. You understand that, Mr. Schaefer?

Mr. Schaefer: Yes, your Honor, that is a fact.

The Court: I realize that that is an error, and you will make note of the change, Mr. Clerk. Make that “week” instead of “month.”

Mr. Combs: There is one other slight matter, to-wit, that the notice of rescission was served on the 31st of May, but our understanding is that it was served on the 1st of June.

The Court: It was so stipulated or so understood at the pre-trial, and that will be the date that will control.

Mr. Combs: I have stated those matters, then, now, and that is all I have to state in that connection. I want to go on in connection with the amended counterclaim in this matter. According to our construction of the same, counsel has pleaded facts which show that he has no right to a rescission in this matter, and we are at this time, by motion, raising the point in the form of a motion to strike the counterclaim, and our causes of the motion are also set forth in our answer to the amended counterclaim. I call the court’s attention to paragraph V on page 2:

“That immediately upon discovering that the equipment furnished by the plaintiff was not in good condition and [56] ready for use in compli-

ance with the terms of the contract between the plaintiff and defendant, the defendant notified the plaintiff that said equipment was not in good condition and ready for use and specified the particulars wherein said deficiencies and need of repairs in said equipment existed. That thereupon the defendant was informed by the plaintiff, through its agents, that the defendant should assume to make such repairs and additions as were necessary to restore the equipment in such a condition as to comply with the terms of the contract. That thereupon this defendant proceeded to make necessary repairs and additions to said equipment and expended therefor the sum of Two Thousand Five Hundred Dollars. That although defendant expended the sum as aforesaid, it was impossible for this defendant to restore the equipment in a condition suitable for use for the purpose for which it was intended, and that it was necessary in consequence that defendant return said equipment and rescind the contract as hereinbefore alleged.”

It is our understanding of the law that if a contracting party assumes and agrees to make corrections or repairs, if they are necessary, that it therefore or thereby, in any event, waives its right to rescind, if it ever had any right to rescind, and it is our view that this counterclaim does not state sufficient facts to constitute a cause of action, because it, on the face of it, shows that the defendant waived any right to rescission. And the counterclaim does [57] not state sufficient facts to



constitute a cross-complaint or counterclaim for damages for breach of contract, because the allegations are insufficient in that respect. And again we renew our request that the defendant be required to state or elect whether it is proceeding on rescission or on damages for breach of contract, and if they are proceeding on these pleadings on either of these grounds, that this counterclaim be dismissed.

Mr. Schaefer: If the court please, on the question of election as set forth in our points and authorities, the very case which counsel cited is set forth. We have each served our points and authorities, your Honor, and filed them.

The Court: Are they in the record? Have you them, Mr. Clerk?

The Clerk: There is a statement of facts, your Honor, there. Whether the authorities are there I don't know.

Mr. Schaefer: They are attached to it, your Honor. In answer to counsel's remarks as to an election, if your Honor has read my points and authorities, I have answered that in the points and authorities. The case he cites, of *House v. Piercy*, doesn't go as far as counsel's argument, but it only says that one can only recover on one ground, and alternately, but not on both, and of course that is true. I acknowledge that. But it doesn't require the election to be made at this time. The evidence may go in [58] and then the determination has to be made as to which cause of action is sustained.

And, as I say, the case counsel cites in his brief doesn't go——

The Court: Let me make this observation. I understood at the pre-trial hearing that you elected to proceed on the contract, or that you were proceeding on the contract. Am I in error on that?

Mr. Schaefer: I understood the matter wasn't settled, and that you said I was not required at that time to make an election.

The Court: I stated that the action is on the contract, and you said, "That is correct," and I said, "The action being on contract, it is obvious that election is required."

Mr. Schaefer: That is true. The action is on the contract.

The Court: Yes.

Mr. Schaefer: But I think that is on the question of counsel's other causes of action. He has, I think, three, and your Honor ruled at that time——

The Court: The others were disposed of, dismissed.

Mr. Schaefer: Yes.

The Court: The others were dismissed because of the determination that the action was on the contract.

Mr. Schaefer: That is correct.

The Court: So the other causes were dismissed.

Mr. Schaefer: That is correct. Now, with respect to [59] the argument that the acts of the defendant in making repairs, I take it that the force of his argument is that that is a waiver, but I

don't see that the court can rule on that matter now. The most that can be shown is that it was an indulgence by the defendant in an attempt to preserve the ownership. There is in evidence before your Honor a certain sponsored contract, and the defendant was bound by these contracts, and the evidence will develop, and I don't see how your Honor can rule until there are before your Honor the conditions under which those repairs were made. It is alleged that they were made and charged against the plaintiff. That is not a matter that can be passed upon at this time, because it is a matter of proof, and we are prepared to offer proof on that particular point.

The Court: The question is, whether you have stated an issue which requires proof under the law, and that is what pleadings are for, is to fix the issue and save the time of counsel and the parties and the court in exploring the whole field, to find out what the real facts are. The parties are supposed to know what the facts are, and then to present the issue so that it is concise.

Mr. Schaefer: That is correct, and I understand that that is one of the purposes of the pre-trial.

The Court: Yes.

Mr. Schaefer: And we settled that matter, and your Honor ruled at that time that the counter-claim might be [60] amended, and that amendment has been filed, and I think it follows the outline of your Honor at that time. And we think the matter

is now properly before the court and that the counterclaim is sufficient.

The Court: You think you have stated facts that avoid the rule?

Mr. Schaefer: Yes; we are satisfied on that.

The Court: I will hear the testimony on that and reserve the matter for the future.

Mr. Combs: At this time we would like to call Mr. Paul Eagles as an adverse witness.

The Court: Call him.

Mr. Combs: For cross examination under the—

The Court: Call him. We will find out.

Mr. Combs: Yes. Mr. Eagles. [61]

PAUL EAGLES,

called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

The Clerk: State your name, please.

A. Paul Eagles.

Direct Examination

Q. By Mr. Combs: Where do you reside, Mr. Eagles?

A. In Los Angeles, 3523 West Olympic.

Q. What is your occupation?

A. I am a merchant.

Q. During the past years of your life have you had any connection with circuses or a circus?

A. Yes.

Q. Will you relate to the court what that connection was?

(Testimony of Paul Eagles.)

A. I have been purchasing agent and had various jobs, and also business manager, and manager.

Q. For what period of time?

A. Well, over a period of approximately 25 years.

Q. And for what circuses did you engage in those activities during that period of time?

A. Well, Al G. Barnes.

Q. Relate to the court approximately what years, and what you did for Al G. Barnes.

A. Well, I was purchasing agent and I was business [62] manager.

Mr. Schaefer: I am sorry. I can't hear, your Honor.

The Court: Speak so that all of us can hear you.

A. I was purchasing agent and I was business manager.

Q. By Mr. Combs: And for what years, Mr. Eagles?

A. The last year was 1938.

Q. What was the first year?

A. Oh, about 1915 or 1914, in there.

Q. Subsequent to 1938 what circus did you work for, if any? Did you say 1928 or 1938?

A. 1938.

Q. Subsequent to that year——

A. Mostly with Al G. Barnes.

Q. Did you ever work for the Great American Circus?

A. Yes.

Q. What year?

A. In 1939.

Q. In what connection?

A. Manager.



(Testimony of Paul Eagles.)

Q. Who employed you?

A. Wayne Daillard.

Q. Do you know who paid your salary?

A. Fanchon & Marco or Great American Circus.

Q. How long did you work for them in that capacity?

A. A little over two weeks.

Q. When did you first begin to work for them in that [63] capacity?

A. About the 19th or 20th of May.

Q. 1939? A. 1939, yes.

Q. Relate to the court the circumstances of your employment, that is to say, was it in writing, or by oral employment?

A. I was called out to Fanchon & Marco's office by Wayne Daillard, and he told me they wanted me to manage the circus, go out and get it ready and take it over to Inglewood and open it.

Q. Who was present at that conversation?

A. Ben Austin and, I believe, Marco.

Q. Were those all the persons present other than yourself? A. I think so, at that time.

Q. And that took place at the offices of Fanchon & Marco?

A. Yes, sir, in Wayne Daillard's office.

Q. What did you say in response to Mr. Daillard's statement?

A. I told him I would go to work.

Q. Was anything discussed regarding your salary? A. Yes, sir.

(Testimony of Paul Eagles.)

Q. What were the terms of that?

A. They handed me a budget list, and it had in it a [64] manager at \$100 a week.

Q. And you took it that that was your salary?

A. Yes, sir.

Q. And that is the amount you were paid?

A. That is the amount I was paid.

Q. Did you begin work immediately?

A. The next morning.

Q. And that was approximately the 19th of May, 1939?

A. Yes, somewhere in there. It was on a Friday morning, just prior to the 24th.

Q. Upon the 19th you went to Baldwin Park, did you?      A. I went to Baldwin Park, yes.

Q. What is Baldwin Park? What significance has that in relation to this circus?

A. That is where the Hagenback-Wallace circus was wintering.

Q. That was the winter quarters of the Hagenback & Wallace circus property?      A. Yes, sir.

Q. Was the equipment of the Hagenback & Wallace Show there at that place, or at least for the most part?

A. For the most part, except some things down in the city proper.

Q. Was the equipment, including the howdahs, there or elsewhere?

A. I think they were over at the studio. [65]

Q. What studio?      A. M. G. M.

(Testimony of Paul Eagles.)

Q. What did you do upon your arrival at Baldwin Park?

A. I met Mr. Clawson there, who was in charge of the property of the Hagenbeck-Wallace circus shows.

Q. That was your first act upon your arrival, that you met him?      A. Yes.

Q. Was anyone with you when you arrived other than you and Clawson there?      A. No.

Q. Did anyone join you during that day?

A. Wayne Daillard came out.

Q. What time did he arrive?

A. Oh, some time in the forepart of the morning; I would say somewhere around 9:00 o'clock.

Q. What time did you arrive?

A. About 7:30 or 8:00 o'clock.

Q. What was the first thing that you and Mr. Clawson did?

A. I told him I was going to be the manager of the new circus, and I was going to help him get the stuff out.

Q. What did he say?

A. He said all right.

Q. There were just the two of you present at that conversation? [66]

A. I believe so. There could have been other people. I believe Brown, the caretaker, was there.

Q. Harvie Brown?      A. Yes.

Q. What did you do then?

A. We started to lay out what we were going to take.

(Testimony of Paul Eagles.)

Q. What did you lay out first, if you recall?

A. Wagons and poles and tents, and stuff like that.

Q. Did you examine those items at that time?

A. Generally, yes. I didn't personally examine them.

The Court: You didn't what?

A. Personally examine them all—just generally.

The Court: Let me understand. You say you didn't personally examine them—just generally?

A. The wagons were sitting in the yard, and I walked by them and looked at them, that is all, and figured the ones we were going to take. There were some 55 or 60 pieces there, and I knew we were not going to take that many.

Q. By Mr. Combs: At that time did you pick out the wagons you were going to take?

A. Yes.

Q. How many did you pick out?

A. Around 25 or 26 wagons, somewhere in there.

The Court: Let me ask you: How many wagons were there altogether?

A. I would say 48 to 50. [67]

The Court: And you had the pick, and picked 23; is that the idea?

A. Yes. 26 was the exact number that I finally ended up with.

The Court: 26?            A. Yes.

(Testimony of Paul Eagles.)

Q. By Mr. Combs: Now, after that, after you picked out the wagons, what did you do?

A. Well, I started employing people around there for different positions, bosses.

Q. And in that connection whom did you employ? Do you have any record of that?

A. Well, yes. I employed a boss property man, a head porter, and a——

Q. Who was the boss property man?

A. Oh, I don't know. I would have to look at the records.

Q. But you recall that Pat Graham was the head porter?      A. The head porter.

Q. Who else did you employ, Mr. Eagles?

A. All the general bosses there. Singleton was there, but he had been employed by Charlie Morgan, of Fanchon & Marco.

Mr. Schaefer: I move to strike that out as a conclusion of the witness.

Mr. Combs: This man was manager of the circus, and [68] would be able to say.

The Court: Do you know?

A. He was working there, and he told me he was employed by Fanchon & Marco.

The Court: That will be stricken. The court will not consider it.

Q. By Mr. Combs: What else did you do that first morning, the 19th?

A. We ordered the tent down, I believe, that morning, from storage, at Baldwin Park.



(Testimony of Paul Eagles.)

Q. That tent belonged to whom?

A. It belonged to Baker & Lockwood.

Q. What did you do with the tent?

A. Took it down at the back lot, and Singleton took the poles and his men and started laying them out, getting ready to erect the tent back there. I also hired a painter to paint all the title of this circus off and put "Great American Circus" on the side of them.

Q. Was this all done on that first day?

A. Yes; we started.

Q. Was there anything else you did on that first day, that you recall?

A. Got all the stuff together and started putting it all together.

Q. Did you lay out the tent rigging, blocks and falls?      A. Singleton did. [69]

Q. Did you direct him to do it on that day?

A. Yes.

Q. Did you examine the poles for the circus?

A. Yes.

Q. All of this equipment was second-hand or used circus equipment, was it not?

A. It was.

Q. You knew that fact at least as early as the 19th of May, did you not?      A. Yes.

Q. In fact you knew it prior to that time, did you not?

A. I had it under sub-lease from November of 1938 until around the middle of March, or later, possibly.

(Testimony of Paul Eagles.)

Q. Of 1939? A. Yes, sir.

Q. You were very familiar with all of this equipment? A. Yes, sir.

Q. Including both what was taken by Fanchon & Marco for the Great American Circus and that which was not taken; is that correct?

A. That is right.

Q. What did you do when you arrived at Baldwin Park with relation to examining and making such repairs as were necessary to the wagons?

A. Well, I believe that first day I hired a mechanic who was on the Barnes Show, Forbes—I am sure it was the [70] first day—and another man who handled the tractors, and I told them to look over the wagons that we were selecting, one of them to look them over for the rings, to let them up and down off the train to see if they were all sound, and, if they were not, to get them repaired.

Q. Under your direction and supervision?

A. That is so.

Q. Did he report back to you in that connection? A. Yes.

Q. What did he report to you?

A. He reported to me that the wagons were usable.

Q. And were there any repairs that were made on those wagons?

A. Yes. I told him to make any necessary repairs on the wagons.

(Testimony of Paul Eagles.)

Q. Were they in such condition as used circus wagons would normally be in, at such a time?

A. Yes.

Mr. Schaefer: I object to that as calling for the conclusion of the witness.

The Court: I think, after what he has stated, his conclusion is proper.

Q. By Mr. Combs: And were they, in your opinion, in good condition and ready for use in the business of the production of a circus at that time? I will withdraw that. At the time of May 23rd, when delivery was made at Inglewood? [71]

A. Well, I had used them and we hauled the show out with them.

Mr. Schaefer: I move to strike that answer as not responsive, your Honor.

Q. By Mr. Combs: In your opinion. Just answer the question.

The Court: Answer the question as propounded.

Q. By Mr. Combs: In your opinion.

A. They were in usable condition, yes.

Q. Now, was that also true of the tent rigging, blocks, falls and chairs?

A. I didn't make a personal examination of those, except the chairs, and I had had them on rental before.

Q. What was the condition of the chairs?

A. They were in good condition. I had rented them on a number of occasions, even over at the Tournament of Roses parade.

(Testimony of Paul Eagles.)

Q. They had been used in January of that year, on that occasion?

A. That is so. And I used them after that at Wrigley Field for the Angelus Chair Company, I believe it was.

Q. In your opinion were they usable?

A. The chairs were in good condition.

Q. Did they constitute a hazard to the business when they were used?      A. No. [72]

Q. With relation to the tent rigging, blocks and falls, in your opinion did they constitute a hazard to the business at the time of their being used at the Inglewood show?

A. I didn't personally have my hands on them or examine the rigging, only just generally seeing that everything was in its place.

Q. Did you have occasion to examine the train flat decks and runs that were rented under this contract?

A. I selected the cars themselves, with Clawson.

Q. Did you select the calliope?

A. That is the only calliope on the show, and it was there.

Q. You saw it there and knew what calliope it was, did you not?      A. Yes.

Q. Now, did you have occasion to examine the condition of or the existence of the wardrobe?

A. I hired a fellow by the name of George King to look that over, who used to be a wardrobe man on the Barnes Show.

(Testimony of Paul Eagles.)

Q. Did he look it over, in your employ?

A. Yes.

Q. Did he report back to you? A. Yes.

Q. What did he report to you?

A. Well, he was short on white pants, and he said some of it, some of the stuff, needed cleaning, and I believe it [73] was cleaned.

Q. Did you direct it to be sent out?

A. I took that up with Clawson and he agreed to clean it.

Q. Did you direct the purchase of wardrobe and garments to fill out the band equipment?

A. I left that to Mr. Daillard, and I don't know. They were there when we opened.

Q. Do you know whether or not the band was completely equipped with white caps?

A. They were when we opened, I am sure.

Q. Referring to the sleeping cars, do you know whether or not there were any blankets, sheets or pillow cases or curtains in those cars at Inglewood?

A. There was some blankets, some sheets, some pillow cases; no berth curtains.

Q. When you were at Baldwin Park, subsequent to the 19th and prior to the 23rd of May, did you know of the fact that there were no berth curtains in the sleeping cars? A. Yes, I knew it.

Q. You knew there were none there then?

A. Yes.

Q. Was anything done about acquiring those four items just named, berth curtains, pillow cases, sheets and blankets?



(Testimony of Paul Eagles.)

A. Yes. I called the United Tent & Awning up and got a price on some blankets, and told Mr. Daillard what it was, [74] and he ordered some.

Q. Was that also done respecting pillow cases and sheets?

A. I don't remember how they were purchased.

Q. There were, however, pillow cases and sheets when the train arrived at Inglewood?

A. I couldn't say as to that.

Q. Berth curtains were ordered from some other organization, were they not, or company?

A. Pat Graham bought them in San Diego, the head porter.

Q. Did you direct him to do so?

A. I was at the discussion. Daillard was the one that authorized him to buy them.

Q. Did you hear Mr. Daillard authorize or direct Graham to buy the curtains?      A. I did.

Q. Did you ever have any discussion respecting elephant howdahs?

A. None that I can remember.

Q. Did you ever observe the absence or presence of elephant howdahs during the course of your occupation as manager of this circus?

A. We wouldn't have had any use for them.

Q. Why wouldn't you have had any use for elephant howdahs?

A. The only place they would have been useful was in [75] the grand entry, and that wouldn't fit in with the show.

(Testimony of Paul Eagles.)

Q. You had no grand entry?

A. Yes, but we just put the elephants in with blankets on.

Q. Did you ever make a request to Hagenback-Wallace Circus for elephant howdahs? A. No.

Q. Did anyone, to your knowledge, make such a request? A. No, not to my knowledge.

Q. Did you know where the elephant howdahs were? Did you have occasion to use elephant howdahs?

A. Yes, because I had rented them to M. G. M. Studio.

Q. And you would have known where to get them if you wanted them; is that right?

A. That is correct.

Q. Did you have occasion to use elephant howdahs? A. No.

Q. I have just referred, Mr. Eagles, to a number of items, which include wagons, tent rigging, howdahs, calliope, etc., and a few other items. It is a fact, isn't it, Mr. Eagles, that a circus of the size of the Great American Circus needs a vastly greater quantity of equipment than those few items I have just referred you to? A. Yes.

Q. In other words——

The Court: You don't need the other words.

[76]

Mr. Combs: All right. That is sufficient along that line.

(Testimony of Paul Eagles.)

Q. By Mr. Combs: You have referred to your activities on or about the 19th of May, 1939. Do you recall any other of your activities from that date until the date of May 23, 1939, in connection with your service as manager of the circus?

A. We just continued our painting the show, painting out the titles and lettering them, and getting it put together, and putting up the tent. And we were supposed to have a rehearsal, and we didn't have it out there.

Q. Your time was engaged during that period from May 19th until the stuff arrived in Inglewood in getting it sorted and passed upon and putting in condition this equipment?

A. That is right.

Q. You were out there most of that entire time, were you?      A. All during the day, yes.

Q. That, in fact, was your entire activity during that period of time?      A. Yes, sir.

Q. During that time did you lay out the tent and rigging?      A. George Singleton did the job.

Q. And did you examine it?

A. I saw it when it was up.

Q. Did he do so under your direction and supervision? [77]      A. Yes, sir.

Q. And that is true of every bit of equipment in connection with the Great American Circus?

A. Yes.

Q. In other words, you selected it, laid it out, and examined it before it ever left Baldwin Park?

(Testimony of Paul Eagles.)

A. That is true.

Q. And you knew, as a matter of fact, either from your own knowledge, or from those subordinate to you, the exact status, condition and extent of all that equipment?

A. As near as it is possible for anybody to know, with that much stuff that they are loading up in three days.

Q. Either yourself personally, or through employees of Great American Circus whom you directed to ascertain the facts for you?

A. Yes. Daillard went over some of the stuff with us too.

Q. Do you know what capacity Daillard went over the stuff in?

A. Well, he was my boss. That is all I know.

Q. He was your boss, and you were responsible to him; is that correct?

A. That is right.

Q. Now then, the equipment was delivered at Inglewood, was it not?

A. Yes, sir. [78]

Q. On or about the 23rd of May?

A. That is right, the morning of the 23rd.

Q. Were you present at Baldwin Park when it left there on the railroad cars?

A. I rode the train out.

Q. You rode the train right to Inglewood?

A. Yes, sir.

Q. Then you were present when it arrived at Inglewood?

A. That is right.

(Testimony of Paul Eagles.)

Q. Were you present when the equipment was taken off the cars?      A. Yes.

Q. And present when it was set up at Inglewood?      A. Yes, sir.

Q. Was it all completely set up?

A. Yes, and we had some left over that we sent back.

Q. You sent back some equipment?      A. Yes.

Q. Do you know about what that equipment was?

A. No, but I got a truck out there and they loaded it on those stock cars. We didn't have any stock going over except elephants and camels, and we loaded a lot of stuff in that stock car to send it back.

Q. Now then, the tent was erected and you were then ready for the first performance at Inglewood, was it not?      A. Yes. [79]

Q. And have you in your possession any records which will give, or from which we can obtain a resume of the items constituting the equipment delivered at Inglewood?

A. I have a list of the wagons and their numbers.

Q. Will you be good enough to hand me that list for a moment?

A. Then I have the general total here in my handwriting of the stuff that was on the train.

Q. All right. Now, referring to this document—

The Court: Let it be marked, if it is going to be referred to, as an exhibit.



(Testimony of Paul Eagles.)

Mr. Combs: May we have it marked for identification as Plaintiff's Exhibit A?

The Court: Mark it A-1, and make them A's with numerals after them.

Mr. Combs: Counsel, I will show you A-1 for identification.

Q. By Mr. Combs: I show you Exhibit A-1 for identification, and ask you whether or not you can identify that document as the list to which you just referred.

A. Yes, it is a list I made out at Baldwin Park.

Q. Will you state what these figures on the sheet mean?

A. At the top it says, "Cook House," and then three wagon numbers, which are the wagons the cook house was loaded in. The next two are the light plants, that the light plants were in. [80]

Q. Next under "Lights"?

A. Yes, sir. One of the wagons belonged to the American Circus Corporation, and the other was a wagon furnished by Hagenback & Wallace. The next one is the sound wagon. And the next one is the white ticket wagon. The next one is the train light plant, and the next two are chair wagons. The next one is a property wagon. The next one is a blue plank wagon. The next one is a sideshow wagon. We loaded the menagerie in that. And a wardrobe wagon. Another property wagon. Two more plank wagons. A jack wagon, and another wagon for the padroom canvas. An elephant wagon, for property

(Testimony of Paul Eagles.)

of elephants. A pole wagon, and two padroom trunk wagons. A candy wagon. A red ticket wagon. An orang-outang cage. This next one is a private wagon that belonged to Goebel, and the usual tigers and lions loaded in it. Then there are two trucks on there.

Q. The figures that appear in this second column comprise the footage of the wagons; is that right?

A. That is right.

Q. How many wagons were delivered at Inglewood?

A. All these wagons, to the best of my recollection.

Q. 33 in number?

The Court: Everything on that exhibit was delivered?

A. That is right.

The Court: That answers the question.

A. There was 26 Hagenback wagons, and there was some [81] other stuff on the train too.

The Court: Is that totaled in the exhibit?

A. No.

Q. By Mr. Combs: These wagons were Hagenback-Wallace wagons?      A. Yes.

Q. And the others belonged to other individuals?

A. That is right.

Mr. Combs: We offer the document in evidence as Plaintiff's Exhibit A-1.

The Court: Admitted.

(Testimony of Paul Eagles.)

## PLAINTIFF'S EXHIBIT A-1

Cook House	[Footage]	
51	171½	
52	19	
53	17	
54	13	
Lights		
112	18	
60	18	
Sound		
74	15	
41	18	White Ticket
1200	10	Cross Light Plant
C88	22	Chair
73	18	"
72	18	Props
85	16	Blue Plant
50	18	Side Show and Menagerie
70	19	Wardrobe
84	16	Props
86	16	Plank
80	16	"
87	22	Jack
78	18	Padroom Canvas & Dogs
38	18	Elephant
100	38	Pole Wagon
75	20	Pad Room Trunk
71	20	" " "
76	18	Candy Wagon
40	18	Red Ticket Wagon
	16	Orang
	34	Bert Nelson 2 trucks
<hr/>		
	526½	
	80	Four 20' trucks
<hr/>		
	606½	

[Endorsed]: Filed Nov. 27, 1940.

(Testimony of Paul Eagles.)

Q. By Mr. Combs: Now, did anything occur at Baldwin Park shortly before your departure for Inglewood, with reference to a shortage of wagons?

A. We had the light plant loaded in a wagon we had rented from the Springfield Wagon Works representative in Alhambra. We had the light plant all put in there, and then they sold them to the United Tent & Awning Company.

Q. So you had to change and get another wagon from Hagenbeck-Wallace for the light plant?

A. Yes. This was an Al G. Barnes Circus wagon. And we took the 50 kilowatt plant out and put it in this wagon.

Q. Was that done under your direction and supervision?      A. Yes, sir.

Q. I note that 26 Hagenbeck-Wallace wagons were [82] delivered at Inglewood, whereas the contract called for 20. Do you know the occasion for that?      A. I didn't see the contract.

Q. You never saw the contract yourself?

A. Away afterwards. I didn't read the particulars of it.

Q. All right. Then so far as you knew there were 26 wagons to be taken at that time?

A. That is what my list showed.

Q. That is what you gathered together as necessary to take this show over to Inglewood?

A. Yes.

Q. Now, at Inglewood was there anything particular that occurred with relation to the perform-

(Testimony of Paul Eagles.)

ance that was extraordinary or did not go off on schedule and in a normal manner?

A. In Inglewood?

Q. Yes.

A. Well, no. I had to hold the show a little bit there on account of the actors hadn't had a rehearsal.

Q. How long did you hold the show for that cause?

A. To the best of my recollection, about 40 minutes.

Q. But it went on about 40 minutes late at that time?

A. Yes.

Q. Was that delay in any way caused by faulty or defective equipment? [83]

A. No.

The Court: He said because the actors hadn't rehearsed.

Q. By Mr. Combs: Did the evening show go off on schedule and in order?

A. Yes, sir.

Q. What did you do after you completed the performance at Inglewood?

A. Well, we tore the show down and got ready to move. It took us all night to tear it down, and we got out that morning and loaded it on the Santa Fe, and went to San Diego.

Q. Was there anything extraordinary about the length of time necessary to tear the show down?

A. We had all green help.

Q. Would you say it was competent or incompetent circus help?



(Testimony of Paul Eagles.)

A. Some of them were all right, competent help, and others, the working men, were new and inexperienced.

Q. Where did you get the workmen for this performance?

A. I sent Pat Graham out, and he ——

The Court: Do you care where he got them?

Mr. Combs: The only point on that, if your Honor please, is that I would make this offer of proof in that connection, that these men were just general working people that they picked up from employment places on Main Street, and not efficient, capable circus hands.

Mr. Schaefer: It is immaterial where they got them, [84] if they were green men.

The Court: If you go into that, it would open the field for cross examination that would consume considerable time.

Q. By Mr. Combs: Directing your attention to a stage upon which the Fanchonettes performed, was there anything extraordinary in so far as the circus was concerned about that piece of equipment?

A. Yes. It was not suitable for quick movement.

Q. How long did that take to construct and tear down?

A. Well considerable time. The first day we set it up the men that built it should have been——

Q. That was in Inglewood?

A. That was in Inglewood.

(Testimony of Paul Eagles.)

Q. Who tore it down?

A. I would say it took four or five hours to put it up. And then our men struck it, and we loaded it on the pole wagon that night.

Q. You loaded it on the pole wagon?

A. Yes.

Q. And took it to the railroad cars and shipped the whole of the equipment to San Diego?

A. That is right.

Q. When did you arrive in San Diego?

A. Along in the afternoon. I don't remember the exact time. [85]

Q. That would be the afternoon of the 24th of May?

A. No, that was—we showed in Inglewood the 24th of May, and that would be the 25th of May. It took us all night to load out, and we traveled on the 25th.

Q. And arrived there on the 25th? A. Yes.

Q. Did anything occur at Inglewood in relation to setting up the show out of the ordinary—I mean at San Diego—out of the ordinary?

A. No, at San Diego we moved right along.

Q. You got the show set up in order and nothing out of order occurred?

A. We hired some tractors there to pull us on the lot.

Q. In connection with that, relate to the court what the occasion for hiring the tractors was.

(Testimony of Paul Eagles.)

A. It was a soft, sandy lot, and we didn't have any power.

Q. What happened when the wagons were pulled out on the soft, sandy lot?

A. We just pulled them in off the street as far as they could go on hard ground, with the show's trucks, and then the hired caterpillars pulled them over and spotted them.

Q. What was the occasion for using caterpillars? Was it because the lot was so difficult to negotiate with heavy wagons?

A. That is right. [86]

Q. And these wagons stood up under the strain of hauling around with caterpillars, did they?

A. Yes.

Q. All of them at that time?

A. Yes. I can't remember of any breakage.

Q. How many shows did you have at San Diego?

A. We gave five shows, I believe.

Q. And they all went off on schedule?

A. One was at night, the night of the 26th, and then we was in San Diego the 27th and 28th.

Q. Five shows, and all on schedule? A. Yes.

Q. And as expected? A. Yes, sir.

Q. Nothing extraordinary occurred?

A. Not that I know of.

Q. The performance normal and up to standard?

A. Yes.

A. Yes.

Q. And equipment normal and up to standard at that time?

A. It was all satisfactory.

(Testimony of Paul Eagles.)

Q. What did you do after completing those five performances in San Diego?

A. We hired another tractor that night to come off with, and we tore the show down and hauled it off.

Q. And where did you go?

A. Back to the train again, and loaded it on the flat [87] cars. And from there we went to Santa Ana.

Q. Did anything occur at Santa Ana with relation to the equipment that was out of the ordinary?

A. Yes. We had a long hill there, and I think the pole wagon went over the side of the run.

Q. What was the occasion for that?

A. I wasn't there. All I know is the report that it was so.

Q. Who reported it to you?

A. The trainmaster—or Pat Graham came down and told me it was reported to him by the trainmaster.

Q. Are you able to say whether or not it went over the side of the run because of some faulty construction of either the wagon or the run?

A. I don't know.

Q. Have you ever had opportunity to observe a wagon slip off a run before, in the conduct of a circus?

A. Yes.

Q. In fact, that is usually an accident that occurs as a result of wrong turning?

(Testimony of Paul Eagles.)

A. It could be, if he didn't handle the pole of the wagon properly coming across the platform.

Mr. Schaefer: I move to strike that out, your Honor. He wasn't there, and he has given what might be a reason.

The Court: He is giving his ideas as a man familiar with this sort of business, and I think it is proper. The [88] court will only give it such weight as it ought to have, anyway.

Q. By Mr. Combs: Now, in other words, it is a more or less common accident——

The Court: The other words do not help us any.

Mr. Combs: All right. Withdraw the question.

Q. Then was there anything else that occurred at Santa Ana out of the ordinary, in the production of this circus?

A. We were late, to start with, getting in there. If I remember correctly, it was about 9:30 when we got into San Diego, in the morning.

Q. What time were you due there?

A. We was off the lot a little after 2:00 o'clock in San Diego, and should have been—about 3:00 o'clock—and we should have ben there about 6:30 to 7:00.

Q. Do you know what the occasion for that lateness was?      A. No, I didn't even ask.

Q. Just a case of the train not getting there?

A. Not arriving.

Q. You arrived at 9:30 instead of about 6:00 o'clock?      A. That is my recollection.



(Testimony of Paul Eagles.)

Q. What did you do after it arrived?

A. We unloaded the show, and took it up to the lot, which was about three or three and a quarter miles, and started erecting our tents.

Q. In your experience as a showman, is three [89] to three and a quarter miles a long or a short haul?

A. That is considered a long haul.

Q. What is considered a normal or ordinary haul?

A. A mile to a mile and a half.

Q. Do you know anything with respect to the manner in which the equipment was operated on that long haul from the railroad to the lot?

A. Well, they had difficulty—they reported to me that they had difficulty with one wagon.

Q. What was reported to you with relation to that wagon?

A. That they had a hot box. One of the hired trucks was hauling it.

Q. Do you know anything about the speed at which that wagon was being hauled?

A. I do not.

The Court: A hot box on one of the wagons?

A. On one of the wagons, the plank wagon, I believe it was.

Q. By Mr. Combs: It was a plank wagon?

A. I believe it was.

Q. That was the only one that was reported to you as out of order at that time?

A. It is the only one we had trouble with.

(Testimony of Paul Eagles.)

Q. At Santa Ana? A. At Santa Ana.

Q. Now, what did you do after you learned that the wagon [90] had a hot box?

A. Sent the shop man up to find out about it, Forbes, and a fellow that he had.

Q. Did you get any report from them?

A. They reported back to me that the wagon was on the way up there.

Q. How soon did they make that report?

A. Within 15 or 20 minutes.

Q. Within 15 or 20 mnutes? A. Yes.

Q. Then will you state that the wagon arrived at the lot in Santa Ana prior to and preparatory to erecting the equipment?

A. I don't remember accurately.

Q. Approximately an hour or so after the arrival of the train?

A. After the arrival of the train, yes.

Q. I am just guessing on that.

A. Approximately an hour and a half.

Q. Did anything abnormal occur in the erection of the equipment at Santa Ana that day?

A. Not that I can remember.

Q. Did the show go on on schedule that day?

A. No.

Q. How long did it take that day, if you recall, to erect the Fanchonette stage? [91]

A. Well, considerable time.

Q. Will you say that it took as much as from four to seven hours to erect that stage?

(Testimony of Paul Eagles.)

A. Not seven, no. I would say it would take an average of two and a half hours.

Q. Two and a half hours, an average?

A. Yes.

Q. The Fanchonette stage was no part of the equipment belonging to Hagenback-Wallace, was it?

A. No.

Q. That belonged to Fanchon & Marco, did it not?

A. It was provided for by them. I have who it belongs to here, because I returned it to them, I believe. No, I haven't. It was somebody they rented it from.

Q. In Inglewood, and it was not upon the circus train?

A. It was loaded on the circus train every night.

Q. I mean prior to your arrival in Inglewood?

A. No.

Q. Did you take over a large quantity of the equipment in addition to that at Baldwin Park, on your arrival at Inglewood?

A. We made some swinging ladders there, and we cut the big ring curbs up, reduced them in size, so we could load them in the wagon. They were great big wide ring curbs, and we just cut them in size.

Q. Back to Santa Ana again: Did anything occur in the [92] production of that circus that delayed or interfered with the thing?

A. All the things we talked about. I was ready to show at 5:30.

(Testimony of Paul Eagles.)

Q. What time was the show supposed to be produced?

A. It was supposed to be at 2:15 in the afternoon.

Q. Then you were about two hours and fifteen minutes late?      A. That is right.

Q. What was the occasion for that lateness?

A. Everything in general.

Q. What do you mean by that?

A. I mean late arrival, long haul, and the floor held us up a little.

The Court: 15 or 20 minutes, you said?

A. Something like that, and the laying of the stage. That is about it.

Q. By Mr. Combs: What about the men?

A. Yes, the men were still green. They were coming and going. We had a tremendous turnover in labor every day.

Q. Hard to manage, and hard to get others to work efficiently and fast?

A. That is right. They didn't know what to do, and we didn't have enough bosses to show them.

Q. In your experience with circuses, do you very occasionally or rarely have a hot box in the equipment? [93]

A. It is not uncommon.

Q. It is not uncommon?      A. No.

Q. What did you do after the performance in Santa Ana?

(Testimony of Paul Eagles.)

A. After the night performance, we tore down in the usual manner and loaded the stuff in the wagons and hauled them back to the train.

Q. Was there anything abnormal about that on that occasion?

A. The same wagon gave us trouble going back, although we had greased it.

Q. But you greased it and it did operate all right?

A. No. It gave us trouble. It had another hot box.

Q. Did that delay you any in getting the equipment on the train?           A. It delayed us some.

Q. How much?           A. Oh, 30 minutes or so.

Q. Then what occurred after you got the stuff loaded in Santa Ana?

A. We went to Pasadena.

Q. When did you arrive in Pasadena?

A. We were late getting into Pasadena, very late.

Q. How late?

A. I don't recall the time, but I know it was late.

Q. Several hours? [94]           A. Yes.

Q. Was that due in any way to the condition of the equipment, or was the cause of it the transportation of the railroad?

Mr. Schaefer: I object to that. Let him tell what it was.



(Testimony of Paul Eagles.)

The Court: What was the cause of the delay?

A. I was asleep. I don't know.

Q. By Mr. Combs: You don't know?

A. I was on the train. I went to sleep, and I know we were late into Pasadena.

The Court: Do you know what time you arrived in Pasadena.

A. I can't recollect exactly. It was in the late morning some time, I would say around 9:30 to 10:00 o'clock.

The Court: What time should you have arrived?

A. We should have arrived there possibly at 8:00 o'clock or 8:30.

Q. By Mr. Combs: What time did you leave Santa Ana?

A. I believe it was about 6:30. I am not very clear on it.

Q. What occurred when you arrived at Pasadena?

A. We hauled the stuff out to the lot, all the wagons and everything, and started to erect the tent and the main falls, and the rope on the third pole, I believe, was the one that broke. It snapped about three times when we were [95] pulling the peaks.

Q. Did anything else occur other than that at Pasadena?      A. We lost the afternoon show.

Q. Did you get the main fall repaired?

A. Yes; they spliced the rope, I am sure.

Q. Do you know who spliced it?

(Testimony of Paul Eagles.)

A. I believe Singleton or one of his sail-makers. I couldn't say.

Q. Had you ordered any rope prior to that time for the main falls? A. Yes.

Q. How much rope? A. 1500 feet.

Q. From whom?

A. Wired the order in to Daillard.

Q. When did you do that?

A. At Inglewood.

Q. At Inglewood? A. Yes, sir.

Q. An extra or spare rope for the main fall, is that right? A. Yes.

Q. And it had not arrived by the time you got to Pasadena? A. No.

Q. Was there anything else in relation to the equipment [96] that was abnormal or unusual on that day at Pasadena?

A. I don't think so. We showed that night.

Q. You showed that night? A. Yes.

Q. Did the show go on normally or in order that night?

A. Yes. I had a complaint from a couple of actors, but that was straightened out.

Q. The performers all went on and performed their acts? A. That is right.

Q. In fact they did so at all of the productions of the circus that were given, did they not?

A. That is right.

Q. Then after Pasadena what did you do?

(Testimony of Paul Eagles.)

A. Tore down and loaded up and went to Pomona.

Q. Did anything abnormal happen on that occasion?

A. The men left the dog wagon on the lot, and after we were ready to load they come down to that place where the dog wagon was, and they found it was off the lot.

Q. And you had to go back and get it?

A. Yes, we had to go back and get it.

Q. That delayed your departure slightly, didn't it?

A. It did.

Q. But there was nothing in connection with the equipment that caused that or any other delay there at Pasadena?

A. No. They just overlooked it in the dark.

The Court: What kind of a wagon did you say?

[97]

A. A dog wagon. We had a dog act.

Q. By Mr. Combs: Then when did you arrive in Pomona?

A. We arrived in Pomona about 8:30, if I remember correctly.

Q. On what day?

A. On the 1st of June; the 30th at Pasadena, and the 1st at Pomona.

Q. Wasn't it the 31st day of May?

A. Pomona, that is right, the 31st day of May, on a Wednesday.

(Testimony of Paul Eagles.)

Q. Did you get the show up in order on that day?      A. Yes.

Q. On time?

A. We were just a little late. I would say 3:00 o'clock we opened the doors.

The Court: That was Pomona?      A. Yes.

Q. By Mr. Combs: What was the occasion for being that late?

A. The usual thing, just that the men didn't function properly, although we were better organized there than we had been at any other time.

Q. Green labor?      A. That is right.

Q. And not the equipment?

A. I don't remember of any failure of equipment in [98] Pomona.

Q. Did you put on the matinee?      A. Yes.

Q. In order?      A. Yes.

Q. Did you put on the evening show?

A. Yes.

Q. In order?      A. Yes.

Q. Nothing abnormal occurred at either of those shows?      A. Not that I can recall.

Q. Subsequent to that what did you do?

A. That is the night we had the labor trouble. And we were billed to go to Glendale, and at the last minute Daillard, who had been away all day—I think it was around 10:00 o'clock or 10:30—he came back and told me that the A. F. A. had pulled out some acts.

Q. What is the A. F. A.

(Testimony of Paul Eagles.)

A. American Federation of Actors.

Q. A union? A. That is right.

Q. Did Daillard say anything else at the time?

A. We had our transportation paid to Glendale, and somebody went down and changed the destination to Baldwin Park.

Q. Did you do that? [99] A. I did not.

Q. Did you go to Baldwin Park?

A. I went to Baldwin Park.

Q. When did you arrive there?

A. In the early morning.

Q. On the 1st of June, in the early morning?

A. Yes.

Q. What occurred when you arrived at Baldwin Park?

A. We unloaded the train and took it back in winter quarters, and I stayed there with the crew and put the show away and returned all the rented stuff to the different people. We had horses from some people; we had tents from others, Baker & Lockwood.

Q. Under whose direction did you do that?

A. Wayne Daillard's.

Q. And there was no further performance of the circus after that? A. No.

Q. Back again, Mr. Eagles, to Pasadena: Did you have any extraordinary or unusual trouble with the laying of the stage in Pasadena?

A. In Pasadena is where Red Forbes started to lay that stage, and the property boys never laid it,



(Testimony of Paul Eagles.)

and he brought his crew over there and thought possibly he could get some of them to lay it, but he didn't and we had to put a lot of extra men on there to lay the stage, and it was quite a [100] problem.

Q. The loss of time in the laying of that stage must have been of concern to you prior to that time, because you called in Forbes to assist?

A. That is right.

Q. And you had already noted that it was a hazard or obstacle to getting the equipment erected in time for performance; is that right?

A. That is right.

Q. Again at Pasadena, did anything occur there with relation to the refund of admissions?

A. No—at Santa Ana.

Q. Was it at Santa Ana?           A. Yes.

Q. Isn't it true that at Pasadena you were ready to put on the show and——

A. No; that was Santa Ana. We missed the afternoon show in Pasadena.

Q. But at Santa Ana you were ready to put on the afternoon show, and did anything occur in that connection?

A. I had all the performers ready, and notified Mr. Clawson, who was the equestrian director, that we would show that afternoon, and the committee who were showing there wanted the return of some money, and in the meanwhile they went out to the wagon with Mr. Daillard, and I believe he turned back some money. [101]

(Testimony of Paul Eagles.)

Q. About \$90?

A. I believe so. And there wasn't any customers there, so I called it off.

Mr. Combs: That is all.

The Court: Cross examine.

Mr. Schaefer: I understand that Mr. Eagles has been called as an adverse witness. Is that right?

Mr. Combs: That is right.

Cross Examination [102]

Q. You say you didn't personally examine all the equipment? A. That is true.

Q. And you didn't personally examine the wagons? [107] A. Only in a general way.

Q. How carefully did you make the examination?

A. I probably walked around them and looked at them in a general way.

Q. You made no examination of the axles or the boxings? A. No.

Q. There were probably 48 or 50 wagons there?

A. That is right.

Q. And you selected wagons merely for their size, or what you thought would be their ability for carrying the loads? A. That is right.

Q. And out of that group you picked out 26?

A. That is what my record shows.

Q. Now, the men you employed, were they what might be called the heads of departments? You employed a porter?

A. A head porter, yes. They were heads of de-

(Testimony of Paul Eagles.)

partments, yes, with the exception of George Singleton. [108]

A. Well, generally speaking, they were in good condition. There were some repairs made on them in Inglewood, and they passed the test there. There was some decking on one or two of the cars that I fixed in San Diego, spliced in some lumber around the decking.

Q. Were there any other repairs made to the cars other than in San Diego?

A. Yes, at Inglewood. We had an inspection at Baldwin Park.

Q. Who made those repairs?

A. The Santa Fe Railroad mechanics.

Q. And were you there when they made them?

A. I was at lunch with Mr. Clawson when the two of them come down and reported that there was a couple of minor repairs they wanted to make on the outside of the cars, and [116] he agreed to take us over to Inglewood if we had air, if the valves were in good shape, the air lines, and the air was all right when the Pacific Electric coupled on to us. And then they took the train back to Los Angeles and made two or three hundred dollars worth of repairs.

Q. Did I understand you to say they were minor repairs?

A. Yes. They gave the train a general going over. They even repaired a step on one of the coaches.

(Testimony of Paul Eagles.)

Q. Were there any blankets or sheets or pillow cases?      A. There were some.

Q. How many?

A. I didn't count them. Mr. Graham did. I haven't the count here in front of me.

Q. By the way, Mr. Clawson was the representative, so far as you knew, of Hagenbeck-Wallace out there?

Mr. Combs: He was your employee, too.

Mr. Schaefer: He was an employee when he came over in the circus. I am not denying that.

The Court: Proceed.

Q. By Mr. Schaefer: Mr. Clawson was the man in charge of the winter quarters?      A. Yes.

Q. Did you have any conversation with Mr. Clawson with respect to the blankets and sheets and pillow cases?

A. Yes. I believe I asked him if he was going to furnish them—or Daillard was there, and I can't remember [117] the conversation, but I know that Mr. Daillard asked me to call up the United Tent & Awning Company, or somebody, and get a figure on some blankets, used army blankets.

Q. What I am asking you now is for your conversation with Mr. Clawson.

A. I can't recall it, exactly what the conversation was.

Q. I don't want it exactly. I want only the substance.

(Testimony of Paul Eagles.)

The Court: Was it with Clawson?

A. Yes.

Q. By Mr. Schaefer: What did he say to you about it?

A. I can't recall that.

Q. Do you remember the substance of it?

A. No, I don't.

Q. Did you talk to him about it?

A. The three of us were there, Daillard and Clawson and myself.

Q. Did you or Daillard say anything to Mr. Clawson about the shortage?

A. I believe we asked him if he was going to furnish them.

The Court: What did he say?

A. I think he said no, because we ordered them again too; Fanchon & Marco ordered them.

Q. By Mr. Schaefer: Isn't it a fact that Mr. Clawson said that he would get them, and attempted to get them, and telephoned to someone and couldn't procure them? Don't you [118] recall that?

A. No, I don't. I say, I am a little hazy on that, Mr. Schaefer. [119]

A. Well, it was second-handed stuff. I wouldn't want to venture a guess on whether it was good or bad. I know what use it had had, and so on. It was in condition equal to the use it had had. [120]

Q. On your arrival at San Diego, you say you showed in San Diego on schedule. How much time did you have to erect the equipment at San Diego?



(Testimony of Paul Eagles.)

A. We had from the time we arrived in there on the 25th, and all the rest of that day.

Q. An entire day; is that right?

A. Yes.

Q. You arrived at what time on the 25th?

A. Some time in the afternoon.

Q. When did you leave Inglewood?

A. We left Inglewood the morning of the 25th.

Q. And you arrived the afternoon of the 25th?

A. Arrived in the afternoon, whatever time it took the Santa Fe to run us down there.

Q. When was your first performance in San Diego?

A. Our first performance was on the night of the 26th.

Q. Then you had approximately a day and a half to erect your equipment; is that right?

A. Yes.

Q. You said that the performance went off in San Diego according to schedule? [122]

A. That is right.

Q. Were there any acts that were not performed?

A. Well, I have the performances right here, and I am sure they all went off.

Q. They all were performed? A. Yes.

Q. What time did you leave San Diego?

A. It was a little after 2:00 o'clock when we pulled off the lot, and I imagine an hour or two hours after that we left San Diego.

Q. Did you leave San Diego late?

(Testimony of Paul Eagles.)

A. I don't know. I paid off the tractors, and it was pretty well loaded when I went down to my stateroom, and I don't remember whether we got out of there late or not. I am sure we must have gotten out rather late, because it was after 2:00 when we got off the lot.

Q. Did you have some difficulties?

A. The tractors we had pulled us off the lot, a very difficult lot. We had four tractors taking us off of there.

Q. When did you arrive in San Diego?

A. About 9:30.

Q. Was that early or late?

A. That is a little late.

Q. Now, a wagon went off the runs. Will you explain what runs are?

A. The runs are the things that come from the street [123] up to the flat car, made out of wood with cross pieces, just like a driveway, without any floor in them.

Q. It is a driveway off of the flat car?

A. Yes.

Q. And it was a pole wagon that went off the runs?

A. It went off the side of the gunwales of the flat car.

Q. I will ask you if you didn't say to me then, "This was due to the faulty condition of the runs"?

A. I don't believe I did.

Q. You don't believe you did?

A. No.

(Testimony of Paul Eagles.)

Q. The faulty condition of the runs—

A. Those were repaired in San Diego.

Q. Who repaired them? [124]

A. Whitey Beeson.

Q. At whose expense? A. I don't know.

[125]

Q. What was the condition of the rope in Pasadena? Was it good or bad?

A. Just like any second-hand rope.

Q. Would that be good or bad? [134]

A. It would be medium.

Q. Do you remember telling me on the occasion mentioned, "The ropes were all in very poor condition"? Did you so state to me?

A. I can't recall it.

Q. Do you remember stating to me, "While we had some green labor, yet the equipment itself delayed us tremendously"? Did you so state?

A. I don't recall that part of the conversation.

Q. Did you state to me at the time mentioned, "I know that the elephant howdahs never arrived; that the wardrobe [135] was in bad condition, some entirely unusable"? Did you so state?

A. I might have. I probably told you that.

Q. Did the calliope operate on any occasion?

A. I don't know about that.

Q. Did you hear it operate?

A. I didn't hear it operate. I heard it previous to this time. I don't think it ever operated on the Great American Circus.

(Testimony of Paul Eagles.)

Q. But it was delivered to the Great American Circus?      A. Yes. [136]

Redirect Examination

Q. By Mr. Combs: How much of a wardrobe was there at Baldwin Park, that is to say, for use by the circus?      A. A 25 or 30-car show.

Q. In other words, there was a vast quantity of wardrobe out there?

The Court: We don't care about the other words.

Q. By Mr. Combs: A quantity that wasn't necessary for use on your show?

A. That is right.

Q. And the unusable portion was what you left behind at Baldwin Park; is that right?

Mr. Schaefer: I object to that as the testimony of counsel.

The Court: Yes.

Mr. Combs: No I am not testifying.

The Court: Let him testify. This is not before a jury, and I will instruct myself to disregard it, but it takes up time unnecessarily.

Q. By Mr. Combs: The portion of the wardrobe that was [137] left at Baldwin Park was the unusable portion that you did not need for the Great American Circus; is that right?

A. We left some at Baldwin Park. I couldn't say as to that. The wardrobe man took what he wanted.

Q. And what he took was the usable portion, in usable condition; is that right?

A. Yes; they used it.

(Testimony of Paul Eagles.)

Q. The kind of rope involved, on the main fall, which broke at Pasadena, was available for purchase here in Los Angeles, was it not?

A. Yes.

Q. And, in fact, had actually been ordered from the hardware company?

A. Well, I don't know. It was delivered in Pomona.

Q. But you had directed Daillard to order it from Inglewood?

A. That is when I asked for it, yes.

Q. And it could have been purchased immediately, and for immediate delivery, in Los Angeles; isn't that right?

A. I don't know myself. I didn't make any inquiries.

Q. The stage that was carried by this Great American Circus, was it like all stages, or different from them?

A. Entirely different than any I knew.

Q. In what respect?

The Court: I understood that this wasn't a part of the paraphernalia. [138]

Mr. Combs: On cross examination counsel asked——

The Court: So we need not have that.

Mr. Combs: All right.

Q. You related in your cross examination that the show was not ready for performance in Inglewood. In saying that, did you mean the equipment,



(Testimony of Paul Eagles.)

or the personnel of the show, as distinguished from the equipment?

A. The personnel of the performance was not ready.

Q. That is what you meant when you referred to the show?      A. Yes.

Q. When you referred to a test that the cars had passed, who gave that test?

A. The railroads. We passed a test transferring from one railroad to another. We transferred from the Pacific Electric Railroad to the Santa Fe, to go to Inglewood.

Q. And cars that were in unusable condition would not be passed?

A. They won't use them.

Q. The seats that were used in this show, were they passed by the seat inspector at Pasadena?

A. Yes.

Q. And at other places?      A. Yes.

Q. They all passed inspection of the local authorities on seating capacity, or the use of seats of that nature?

A. As to their strength and so on and so forth, yes. [139]

Q. And safety factors?

A. Yes, sir.

Q. The condition of the lot in San Diego, can you relate a little more about that?

A. Well, it was a filled sandy lot, very soft.

The Court: Where did that fill come from—dredged from the——

(Testimony of Paul Eagles.)

A. Yes, from the sea. They pump it back over. It was right across from the Marine Base.

Q. By Mr. Combs: Was it a suitable or unsuitable place for the performance of a circus?

A. Not very suitable.

Q. What about the overloading of the wagons? Can you state to the court anything respecting that?

A. We loaded most of the paraphernalia of a 25-car show on 33 wagons, or a 15-car show.

Q. In other words, you were over overloaded at least 40 per cent; is that right?

A. I don't know what percentage, but I think we were overloaded. We had a big top the same as a 25-car show.

Q. You testified that you employed certain experienced men as heads or bosses of certain departments. Were those the only experienced men that were working on this show, as laborers or as equipment men?

A. That list you have reference to that Mr. Schaefer [140] read over?

Q. That is right.

A. I think it was. The experienced ones were the only experienced ones, with the exception of a front door man and a sideshow manager, something like that, but all of the labor was green.

Q. Now, when the equipment was delivered in Inglewood to you, a great quantity of material and equipment was added to it by Fanchon & Marco; isn't that correct?      A. That is right.

(Testimony of Paul Eagles.)

Q. Which increased your overloading, rather than decreasing it, at that point; is that right?

A. Yes; some big poles from over there that the Fanchonettes worked on, and wardrobe. [141]

PLAINTIFF'S EXHIBIT No. A-2

June 28, 1939.

Mr. Marco,  
Fanchon & Marco, Inc.,  
5600 Sunset Blvd.,  
Los Angeles, Calif.

Dear Mr. Marco:

As per our telephone conversation this morning, I am inclosing herewith a copy of a statement which was made by a Stenographer in Mr. Henry Schaefer's office.

This statement does not meet with my approval as it is just a recitation of events that happened while the Great American Circus was on the road and I believe it should be more complete if it is to be submitted to use in the settlement of a claim.

At this time I want you to feel that no information will be withheld and that I will be glad to go over the facts at any time with anybody.

With kindest regards, I am,

Very Truly Yours,

[Written in ink]

Schaefer's Letter June 16.

[Endorsed]: Filed Nov. 27, 1940.

(Testimony of Paul Eagles.)

Recross Examination

Q. By Mr. Schaefer: You spoke of overloading, counsel says 40 per cent. You discussed this matter with Mr. Clawson and laid out the whole circus with him, didn't you?

A. With Mr. Clawson and Mr. Daillard.

Q. And at that time the items of equipment and the cars were selected, were they not?

A. With the exception of Inglewood, I wanted more cars and to distribute the loads over more wagons.

Q. I am talking about Baldwin Park now.

A. Baldwin Park.

Q. The equipment was gone over and the number of cars, isn't that right?

A. That is true.

Q. And you had 50 wagons out there at Baldwin Park, didn't you? [143]

A. Yes, about 50.

Q. And there were four trucks that Fanchon & Marco got that they used to carry equipment, in addition?

A. Yes.

Q. Isn't it the custom of all circuses to employ some green labor from town to town?

A. Well, yes, organizing, and when they first open it is, some green labor.

Q. And from town to town they take some labor?

A. They usually have the same crews come back, and they add to them.

Mr. Schaefer: All right. That is all.

(Testimony of Paul Eagles.)

Redirect Examination

Q. By Mr. Combs: How many laborers did you have on the circus, other than foremen?

A. Well, roughly, a couple of hundred

The Court: A couple of hundred?

A. Yes. [144]

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CHARLES W. NELSON,

Called as a witness in behalf of plaintiff, being first duly sworn, testified as follows:

The Clerk: Will you state your name?

A. Charles W. Nelson.

Mr. Combs: We are calling Mr. Nelson for cross examination as an adverse witness.

The Court: Proceed. We will find out where he is.

Direct Examination

Q. By Mr. Combs: What is your present employment?

A. I am in business myself in the producing and booking of circus acts.

Q. How long have you been engaged in that business?

A. Practically a period of 35 years.

Q. Were you engaged in that business in connection with the Great American Circus in 1939?

A. Yes, sir. At that time I was in association with Fanchon & Marco as the manager of their



(Testimony of Charles W. Nelson.)

Fair Booking Department.

Q. In that connection did you have the management of the booking of the Great American Circus?

A. I did.

Q. When did you first undertake your duties in that respect?

A. I am not certain of just the definite length of time [145] prior to the opening of the show, but several months, I assume.

Q. Relate how it occurred.

A. Mr. Ralph Clawson came to me and told me that the equipment of the Hagenback & Wallace Show was on the market for sale or hire.

Mr. Schaefer: I don't like to interrupt, but I am objecting to this examination as an adverse witness. I thought counsel was trying to find out whether he is entitled to do that.

The Court: But I haven't told him that he was. I said we would find out.

Mr. Schaefer: I understand the witness is going into the circus——

The Court: He has a right to do that with his own witness. We will see whether he can cross examine him, after we get started.

A. Mr. Clawson suggested to me that the equipment was for sale or hire or rental, or any basis on which it could be disposed of, and I told him that I would bear that in mind, and if I found anybody that was interested I would contact him. In the course of conversation in the Fanchon & Marco

(Testimony of Charles W. Nelson.)

office I happened to mention it to Mr. Bren and several associates, and they evidenced interest in it, and somehow or other brought it to Mr. Marco's attention. And Mr. Marco sent for me and discussed the matter, and asked [146] me to proceed and investigate how it could be purchased. Originally Mr. Clawson set a figure of some forty some odd thousand dollars, and Mr. Clawson went into detail, and we negotiated with respect to the property, which initially was to be a 10-car show. And in the course of further negotiations it developed — Mr. Marco then took it out of my hands, after the contact had been made, and Mr. Daillard came into the picture, and from there on they contacted Mr. Marco, with Mr. John Ringling North, who was president of Ringling Brothers and Barnum & Bailey Shows, and in the course of events I was instructed to get the show together, which I did. That was the extent of my activities, just the performance proper.

Q. Did you go out to Baldwin Park before the 23rd of May?

A. Yes, I did. I went out one day with Mr. Daillard, when the matter was first broached, and I suggested that some of the wheels of the wagons appeared to me as though they had been drying out in the sun, and Mr. Clawson said, "If they have, they will be replaced and put in perfect condition before they are moved off the lot."

Q. When did this conversation take place?

A. This was at least six or eight weeks before the show was opened.

(Testimony of Charles W. Nelson.)

Q. But you didn't go out there just before the show was opened? [147]

A. No, I didn't.

Q. The next thing you had to do with the show was when it was put on at Inglewood?

A. Yes, that was my next contact with the show.

Q. Did you make any observations with respect to the condition of the equipment at that time?

A. For used equipment, it seemed to me it was in a condition that would be average.

Q. Was it usable or unusable?

A. I thought it was usable, from observation and my slight knowledge of what technical details are necessary for the production of a performance.

Q. Excepting for the time the main fall broke in Pasadena, which was then chained to the bail ring, was there any time when the performers were unable to perform by reason of the condition of the equipment? A. Not to my knowledge.

Q. And the same performers did perform after the men had chained the block and tackle to the bail ring in Pasadena?

A. Yes, they gave the full performance, also the performance that night.

Q. Did you employ George Singleton as an employee of the circus?

A. Yes; I employed him as boss canvas man with the show.

Q. When? [148]

(Testimony of Charles W. Nelson.)

A. Oh, his duties were to start, as I recall it, approximately a week before the show opened.

Q. When did you first employ him prior to a week before the show opened?

A. I talked to him approximately about 10 days prior to that.

Q. Did you have any conversation with him in that connection?

A. Yes, I did. He called at my office a few times.

Q. Who was present?

A. Mr. Clawson was present one time, and I believe Mr. Daillard was at another.

Q. What was said the first time by you, and what was said by Mr. Singleton?

A. The exact details of the conversation I can't recall. But George told me then that he had a chance to go north with some show up in Canada and was waiting word from them then. I told him we were going out, and if he thought he would rather be with us, I thought it was advisable for him to wait around and get the job.

Q. And what did he say?

A. He agreed to do this.

Q. Did you have any other conversation with him?

A. Probably four or five days later he came and said he had transportation from this show in Canada, and that he was sending it back, to stay over and work with us. [149]

(Testimony of Charles W. Nelson.)

Q. Did you employ him at that time?

A. Yes, I did.

Q. What was his pay?

A. His salary was to be \$75 a week.

Q. Then shortly after that he went to work, did he?      A. Yes.

Q. Did he go to Baldwin Park?

A. He went to Baldwin Park and did a little preparatory work there.

Q. Did you direct him out there?

A. Yes. I told him to straighten up whatever he thought was necessary so we wouldn't lose time getting started when we decided to go.

Q. Now, Mr. Nelson, did Mr. Singleton ever report back to you about the condition of the equipment out there?

A. Well, George told me once or twice that he thought he needed a few pieces of rope here and there. And I said, "Well, that is just a minor detail. Mr. Clawson may have some on hand that he will give to you."

Q. Where did you office during that time?

A. With the Fanchon & Marco organization, in their own office.

Q. Did you pay any rent there?      A. No.

Q. And you used their equipment?

A. Yes. [150]



## GEORGE SINGLETON,

called as a witness in behalf of plaintiff, being first duly sworn, testified as follows:

## Direct Examination

Q. By Mr. Combs: Your occupation, Mr. Singleton?  
A. Boss canvas man.

Q. Your residence?

A. 210 North Main Street, Baldwin Park, California.

Q. How long have you been engaged in the business of boss canvas man?  
A. About 40 years.

Q. In that connection what experience have you had?

A. I have always been a boss canvas man.

Q. With what circuses, and during what years?

A. I can give you back from 1902 or 1903.

Q. All right. Start and list them.

A. Well, there was Sun Brothers; Sparks Circus for 20 years; there was Young Buffalo, 5 years; Al G. Barnes; Sells-Forepaugh; Pawnee Bill; Hagenback-Wallace; Great American; Lewis Brothers.

Q. And other circuses?

A. Cole Brothers, and others.

Q. Many others? [153]  
A. Many others.

Q. Did you have any connection with the Great American Circus at about the time of its exhibition to the public involved in this law suit?

A. Only in the mechanical department.

Q. Will you state when you first undertook your connection or engagement with the Great American Circus?

(Testimony of George Singleton.)

A. It was along the latter part of April when I first talked to Mr. Nelson.

The Court: What year?

A. 1939. He sent for me and hired me. I had contracted to go to Canada, and he advised me to cancel my contract and take their show. He said he would be ready in a few weeks. And the 18th of May he sent for me again and told me the show was ready, to have it in Inglewood the following Tuesday. That was on Thursday, and I had maybe five days to get it ready. So Thursday afternoon I went back and proceeded to get out the wagons and the paraphernalia. In the meantime I hired some men that was around the quarters, labor, and I even sent a man to Los Angeles to pick up whatever men he could for me, and he brought out the next morning about 25 or 30 men that were absolutely no good, so I sent them all back. So then he picked up two or three men, such as assistants, sail makers, and the like, altogether experienced men. When the show moved on the lot at Inglewood I had about 16 men, that is, all told, and the [154] night we moved off all the new men walked away, and I had about eight men left to pack the show. It was 8:00 o'clock in the morning when we got the last wagons to the train. And the show was loaded and moved the same as any other time, loaded light, ready to move, as it had been in the past, but we moved on the lot in Inglewood about five wagon loads of baggage and paraphernalia from

(Testimony of George Singleton.)

Hollywood, so that we had to overload all the wagons. The pole wagon, that had about three loads; it had about 25 tons, where it ought to have had about 10, and we packed all the wagons overloaded leaving there.

Q. That was due to the fact that you had received a quantity of paraphernalia at Inglewood that had not been transferred from Baldwin Park?

A. Mr. Nelson, when he sent me out to quarters, to Baldwin Park, he wanted the show fitted out with a capacity of 5,000 people, and he wanted it loaded on 10 cars, and I told him it was impossible. And he said, "What is the nearest you can figure?" And I said, "I will have to take time to figure." And I figured about 15 wagons.

Q. Cars, you mean?

A. 15 cars, that would take about 26 wagons. And when we finished loading the stuff we had it all loaded in good shape, except the motor power and trucks to move the show with. So we decided to—Mr. Nelson or Mr. Daillard rented four trucks that the Hagenback Show had formerly, [155] and that was the transportation we had.

Q. They were not, however, rented from Hagenback-Wallace, were they?

A. No, sir. They was rented from the Pacific Freight Lines, the people that owned them then. And we had 10 elephants, and they helped, and four head of stock, and even at that we never had half enough motive power. We had a 30-car show load-

(Testimony of George Singleton.)

ed on 15 cars. I had handled the same show, with the same amount of material and stuff, with the Hagenback Shows, with 35 cars, and they allowed me 60 men, working men, besides the other help around, whereas I was moving this show, you might say, with 8 or 10 men. That is where the trouble come. And when we got to Pomona the show had just begun to click and move like it should move; it was just beginning to move, and the railroad train-master told me that night, "You are going to quarters tonight," and I said, "That is impossible," and the next morning—that was about 11:30 or a quarter to 12:00 that night, and when I was called the next morning I was in Baldwin Park. So the next move was to unload the train and take the show back to quarters. And through Mr. Daillard—he says, "Just hold your men together the best you can." He was going to reorganize and finish these dates. So I did. And finally, a day or two after, I was called to Mr. Marco's office, and I went into his office, and he had a lawyer and stenographer waiting to take an affidavit from me with [156] relation to the paraphernalia, whereas I thought all the time that it was to re-open the show, and as soon as I found out what they was trying to do, I didn't have much more to say, and I walked out. So they mailed me an affidavit to sign, which I turned over—I refused to sign it, and turned it over to Mr. Clawson, and it was altogether wrong; some of the stuff that was in there I never even



(Testimony of George Singleton.)

thought of. The next move I made, I went back to quarters, where I was in charge out there, my time ceased, and a man by the name of Dusty Rhodes finished putting the show away. And I think the second day after they paid off the working men. Of course, I drew time for the time I was in their employ and gave a receipt for, I think, \$122, for the time I was employed. Then I asked the cashier about by contract for the season. Well, he says I would have to take it up with the office. So I went out to find Mr. Nelson, and he was out of town or somewhere, and I spoke to someone else in the office, and "Well, you have to see Mr. Nelson." So finally it went on and I tried two or three times, and I would have to see Mr. Nelson, and that is the way my case stood, and I was out of the picture.

Q. When you went out to Baldwin Park when Mr. Nelson first employed you, what did you do out there?

A. I proceeded to get the wagons out and get material out, etc., chairs, poles, rigging, canvas; I proceeded to get the show together, to load it in wagons to go to [157] Inglewood. Then I had an order to put the show up in winter quarters.

Q. Let me ask you about putting it up in winter quarters. Do you mean that you set it all up and tested it and tried it out?

A. Do you know just exactly how much wagon space it would take to load——



(Testimony of George Singleton.)

Q. Did you lay out the falls?

A. I put the big top up. It was all up in the air, and they came out and stopped me and had me tear it down and load it to go to Inglewood.

Q. When did you put it up?

A. I think it was Friday, finished it Friday night some time after dark.

Q. That was the same equipment you loaded to go to Inglewood?

A. Yes.

Q. And the same equipment the Great American Circus used?

A. Yes.

Q. And it was all up there, and you looked at it in the air, set up, before you left Baldwin Park?

A. Yes, sir.

Q. Did anyone else look at it with you?

A. Why, Mr. Clawson went over some of this stuff, and Mr. Daillard was around there, and Mr. Marco was all around, [158] looking at the wagons, but I personally supervised the sorting and loading of all the stuff myself.

Q. Did you look at the wagons before they left?

A. Yes, I helped pick them out.

Q. What was the condition of those wagons?

A. Ordinarily speaking, they was in fairly good shape, good for the purposes used for.

Q. Were they in such condition that they were suitable for the transportation of the circus?

A. Yes.

Q. They were, of course, second-hand or used equipment?

A. Second-hand.

(Testimony of George Singleton.)

Q. Did you set the equipment up in Inglewood?

A. Yes, sir, I did.

Q. Did you have any difficulty in that connection?

A. Not a bit in the world, with the exception that we were shorthanded on labor. We had a whole day to do it. We had it all up in the afternoon.

Q. Of the first day you arrived?

A. Of the first day we arrived. But I would have had it up earlier than that, but we got in town that morning at about 5:00 o'clock and moved this stuff to the lot, and about 6:00 o'clock I had the lot all surveyed ready to go to work a little after, and I had orders not to move or put anything up until Mr. Marco came to the lot, through Mr. Clawson. The understanding was, the contract was, they was [159] to pay, oh, I think it was—whether it was five or ten weeks in advance, for the rent of the stuff. I lost about two hours waiting there, and later on Mr. Marco, I think it was, or Mr. Nelson, and I can't say who else, Mr. Clawson, was all out in front of the lot, and finally Mr. Clawson come to me and said he had a wire from Mr. Eddy saying to turn over the stuff to the Great American Circus, and he was going ahead and put it up, and I lost two hours that morning waiting on that.

Q. Then you did go ahead and put it up?

A. Yes.

Q. Now, did you have any trouble with the equipment at San Diego?

(Testimony of George Singleton.)

A. At San Diego the only trouble we had there, it was a lot below tidewater, and they had pumped a lot of sea sand in, and every time the tide would raise the water would come up, and every wagon that was pulled in off the highway would go right to the wagon bed. Finally we employed two caterpillar tractors, 60's or 80's, I think they called them, or 80 or 90 horse power, but the very largest tractors that could be found, and it took two of them tractors to pull each and every one of the wagons, one at a time, and just drug them right through, putting them in position to unload. And those wagons stood up under that treatment, pulling in, and coming off we had four tractors coming off. And it took me from along about 2:00 [160] or 3:00 o'clock in the afternoon until 11:00 o'clock that evening to get the wagons on the lot, and we wasn't going to show until the next afternoon, and all the men was all worn out, and I sent them to bed. And they began work at daylight, and the show was all up, with the exception of the stage. We had a big caterpillar pushing dirt around, or trying to level it, and it took them all afternoon to get that stage straightened out. They had a man there from Los Angeles, from the Fanchon & Marco office, looking at it. It took them all afternoon. And they was supposed to give a rehearsal. And they were able to give the show the next day.

(Testimony of George Singleton.)

Q. Did you have any trouble with the equipment at Santa Ana?

A. Well, we got in there late, and the top was all ready to go up along about 1:00 o'clock, I suppose, along about 1:00 o'clock. And the wagon that brought the side poles for the big top, was loaded with plank and side poles, and it was necessary to have them in order to raise the big top, that had a hot box that held it up, and finally it got in along about 3:00 o'clock, and we was about ready to open the doors. They could have opened the doors at 3:00 o'clock, or possibly earlier, but one side of the show was up, and the back end was ready, and they could open the doors at 3:00 o'clock. But for some reason, I couldn't say what it was, from the front they called the show off. They gave a [161] night performance. I sent the men to aid them, and came back and finished putting the short side grandstand at the front end up.

Q. What was the reason for being late in arriving at Santa Ana from San Diego?

A. It was a long haul, about a 5-mile haul, in the first place, from the lot down, and it was along, I should say, about 1:30 when we got to the train, and everything was off the lot then, and they had a bad place to load; it was uphill, and a curve in the track, and we had four horses and two elephants to load that heavy wagon, and finally I think they got a tractor to help load the train, and I went to bed about 2:00 o'clock.

(Testimony of George Singleton.)

Q. Had they left when you went to bed at 2:00 o'clock?      A. No.

Q. What would you state was the cause of the late departure from San Diego?

A. I couldn't say whether it was the fault of the railroad company. I think it was loaded between 2:00 and 3:00 o'clock. But lots of times, whenever it is loaded, it is turned over to the railroad company, and will stand for two or three hours at a time.

The Court: He is surmising.

Mr. Combs: That is right.

Q. By Mr. Combs: Now, what was the cause, if you know, for the delay in getting the show up in Santa Ana? [162]      A. I just stated.

Q. The causes you have stated?

A. Yes, about the wagon being late and we couldn't get the poles.

Q. Can you state how long that wagon with the hot box delayed you, if you know?

A. I couldn't say, because I didn't——

The Court: Well, that ends it, if you don't know.

Q. By Mr. Combs: You didn't observe it yourself?      A. No, sir.

Q. After the night show in Santa Ana what occurred?

A. It was loaded to go off the lot, I guess, around midnight, and I rode this same wagon we had trouble with in the morning.



(Testimony of George Singleton.)

Q. What did you observe in that connection?

A. We got about two blocks from the train, and this same wagon had another hot box. I said to the driver, "I will go and get a blacksmith and take the wheel off," and I brought him down, and it took him about 30 or 40 minutes to take the wheel off.

Q. Did that delay the departure of the train any?

A. No, that didn't. There were others behind that.

Q. There were others behind that that were not loaded until after that was loaded? A. Yes.

Q. Did you get away in seasonable or early time, out of [163] Santa Ana, for Pasadena?

A. Well, I couldn't say, because after that wagon came I went to bed.

Q. When did you arrive in Pasadena?

A. It was along about noon, or between noon and 1:00 o'clock.

Q. At the railroad track?

A. Downtown, yes.

Q. How far was the lot from there?

A. About five miles.

Q. Is that a short or a long haul?

A. An unusually long haul.

Q. What was done when you arrived?

A. I got off and got into a taxi and went to the lot and surveyed the lot, and waited there about, fully two hours, before I got the wagons.

(Testimony of George Singleton.)

Q. You finally got the wagons?

A. I finally got one wagon, and then they commenced to come. Then along, I think when I was raising the big top, a fall became fouled, and when I hooked the elephant to it, the rope which fouled in the block, it cut the rope off. That was the lead line on the ground, the one that goes through the snatch block. And so I had to splice this rope.

Q. Did you do that personally?

A. Yes. And proceeded to finish raising the canvas on the big top. [164]

Q. Then what occurred, if anything?

A. Well, there was nothing particularly occurred after that. It was very late then, and it must have been after 2:00 o'clock. So I was ready for the doors along—we could have opened the doors at 3:30, because I had all the front side lumber grandstand back in there, and we could have admitted the people. I sent all my men to eat, and in the meantime Mr. Eagles came in to me and says, "The show is off. They called it off for the afternoon."

Q. About what time was that?

A. Along about 4:00 o'clock.

Q. Was the tent up at that time?

A. The tent was up, and the inspector had been in and inspected it and put his O. K. on it.

The Court: You say, "I spliced the rope." What was the condition of the rope where it separated?

(Testimony of George Singleton.)

A. The rope was in usable condition. I bought the rope myself and had been using it. I had been handling this property since 1937, and had replaced new rope from time to time, and rebuilt seats and poles, and whatever was necessary.

The Court: Well, you have answered the question.

Q. By Mr. Combs: How long did that splicing of that rope take you? A. About 15 minutes.

Q. How long did the breaking of that rope delay the [165] putting up of the tent?

A. Not more than 25 minutes.

Q. About 25 minutes? A. Yes.

Q. After Pasadena you went to Pomona; is that correct? A. Yes, sir.

Q. Anything out of the ordinary or unusual occur there?

A. No, sir. We got in there early in the morning. And this overloading stuff—we had three of Mr. Eagles' trucks, which took this extra staging and poles and a lot of extra baggage and stuff that we didn't have room for on the wagons—they took that across country in the trucks, and got in there early, about 7:00 o'clock in the morning, and the show would have been ready at noon, but that stage was holding it back.

Q. You observed that stage being erected, I suppose? A. Yes.

Q. How long did it take, approximately, to erect that stage?

(Testimony of George Singleton.)

A. Well, never less than three hours, sometimes longer. It depends on what kind of ground they had.

Q. How long was the longest time you recall?

A. At any time I don't think it was over three and a half or four hours.

Q. Was that an unusually long time for the erection of the stage? [166]

A. 30 minutes—they should put it up in 30 minutes.

Q. Is that about the allotted time allowable for such a purpose in connection with good management of a circus? A. Yes.

Q. In connection with the labor involved in this circus, did you ever get a full crew of men?

A. No, sir.

Q. What was the most men you ever had in your department?

A. At one time I think it was 20 men, and I had them in the morning, and in the afternoon I had about 10 or 12. The labor agent would bring them in in the morning, and they would eat two or three meals, and in the evening they would be gone.

Q. Were they green or experienced help?

A. Well, I will tell you just who they were. He went down on Fifth Street, on Skidrow, and employed drunks and everything else up there that did not know what it was all about, and they wasn't in good condition to work, in the first place, and I told the labor agent——

(Testimony of George Singleton.)

The Court: Never mind. How many does the show require?

A. Ordinarily a show of that size, 60 men would be a full crew.

The Court: And you had how many?

A. At no time over 20 men. [167]

Q. By Mr. Combs: You employed some boys, of course; is that correct? A. For tickets, yes.

Q. And they were inexperienced?

A. They were Italians and Japs and so forth.

Q. I want to ask you a question. Were the wagons involved in this show in good condition and ready for use at the time they were delivered at Inglewood?

A. They was all picked out and loaded?

The Court: Answer the question.

A. Yes, sir; yes, sir, they were.

Q. By Mr. Combs: Is that also true of the tent rigging, blocks, falls and chairs?

A. I inspected them myself.

Q. The answer is yes? A. Yes, sir.

Q. Is that also true of the train flat decks and runs?

A. I couldn't say. That was out of my department.

Q. Did you inspect the wardrobe?

A. That was out of my department.

Q. Did you inspect the calliope?

A. It was out of my department.



(Testimony of George Singleton.)

The Court: You inspected everything in your department?      A. Yes, sir.

The Court: And you have told us about it?

A. Yes, sir. [168]

The Court: Well, that ends it.

Mr. Combs: Just a moment. I think that is all.

Q. By Mr. Combs: Before you left Baldwin Park did you have any discussions or activities in connection with the making of a list of stuff necessary for the production of this circus?

A. Yes, I made a list out and gave it to Mr. Clawson, the stuff we were supposed to use.

Q. That was when you first went out there?

A. It was after I got the stuff picked out.

Q. About what day was that?

A. That was on Friday, the 19th.

Q. And you handed Clawson a list of the stuff you wanted at that time?

A. The stuff I was going to use, that belonged to the Hagenback-Wallace Shows.

Q. Do you know where that list is now?

A. Well, all I could say, Mr. Clawson——

Q. You don't know?      A. I don't know.

Q. You never saw a copy of it?

A. No, sir.

Mr. Combs: That is all.

The Court: Cross examine. [169]

## RALPH J. CLAWSON,

called as a witness in behalf of plaintiff, being first duly sworn, testified as follows:

## Direct Examination

Q. By Mr. Combs: Mr. Clawson, what is your present occupation?

A. With the Amusement Corporation of America.

Q. Is that a circus?

A. Circus and carnival combined.

Q. How long have you been engaged in the business of—or in what capacity are you with them?

A. Manager.

Q. Have you heretofore been engaged in the capacity of manager of circuses?

A. Yes, sir.

Q. For what length of time?

A. Since 1929.

Q. Relate your experience to the court in connection with your activities for circuses.

A. With circuses, I have been what they call a lot superintendent, four years, 24 hour man for the show. After that I became assistant manager of John Robinson's Circus: later assistant manager of Hagenback-Wallace; and then I became manager and assistant manger of the Ringling Show. Then I was transferred to Baldwin Park, [177] California, as manager of winter quarters of the Hagenback-Wallace Circus. At the present time I am with the Amusement Corporation of America.

(Testimony of Ralph J. Clawson.)

The Court: What is your present title and employment?      A. Manager.

The Court: For whom?

A. Amusement Corporation of America.

The Court: Proceed.

Q. By Mr. Combs: Now, did you have some occasion to contact Fanchon & Marco, or their representative, respecting the Great American Circus?

A. I did.

Q. When was that, first?

A. That was along in the first part of May, I would say, in 1939.

Q. Whom did you contact on that occasion?

A. Charles Nelson.

Q. What was the occasion?

A. Trying to rent or lease property from them.

Q. Hagenback-Wallace?      A. Yes.

Q. Where did you first contact him?

A. In the office on Sunset Boulevard.

Q. Of Fanchon & Marco?      A. Yes, sir.

Q. Who was present? [178]

A. The first few visits we was by ourselves.

Q. What was said by you and what was said by Mr. Nelson?

A. I told him we had properties for rent, consisting of elephants and circus equipment, all excepting canvas, and Mr. Nelson said they would probably be in a position to rent some of this stuff the coming year for a circus, and so I told him I would make him a deal any time he was willing to

(Testimony of Ralph J. Clawson.)

go ahead. He called me back one day and said, "Go ahead and make up a list."

Q. How long was that——

A. From two to three weeks, I would say; two weeks, I would say.

Q. What conversation did you have with him at that time?

A. Well, we talked mostly about equipment, how big a show he would want, and what equipment he would need, and so forth.

Q. Just the two of you present? A. Yes.

Q. Where did the conversation take place?

A. That was on Sunset Boulevard also.

Q. And that terminated without any definite arrangement being made? A. Yes.

Q. Did you have any conversation after that?

A. Mr. Daillard was the next.

Q. Where was that? [179]

A. At Fanchon & Marco's office.

Q. About how long before the date of the contract involved in this case?

A. I would say a week, approximately.

Q. That was, then, approximately the 15th of May, 1939? A. Somewhere along in there.

Q. Who was present at that time?

A. Mr. Daillard was all, that day.

Q. Just he and you? A. And Mr. Nelson.

Q. What was the conversation?

A. We was trying to arrange a show, and they wanted a 10-car show, but they wanted seating

(Testimony of Ralph J. Clawson.)

capacity of 5,000 seats. And we explained to them that it would be impossible for them to load and carry that much equipment on 10 cars. So they decided that they would take their people and feed their people at hotels or cafeterias, and they wouldn't need the cook house, so that would eliminate a lot of train space and wagon space. Later on they decided they would have to have a cook house and they would feed them on the lot. So it ended that day. And the next morning Mr. Bren—I met him, he came into the picture, and we started to deal then. The New York office did most of it through long distance telephone.

Q. You had no authority at that time to make a contract with Hagenback-Wallace, did you? [180]

A. No, not with the consent of the New York office.

Q. In fact, in this case the contract did come out of the New York office on the 22nd of May?

A. Yes, the 22nd or 23rd.

Q. When it was executed? A. Yes.

Q. You had that conversation about the 15th, and then you had a conversation the next day with some representative of Fanchon & Marco?

A. Yes, we had conferences every day, two or three times a day.

Q. Right up to the time of the delivery of the stuff at Inglewood? A. Yes.

Q. Who were those conferences mostly between, Mr. Clawson?



(Testimony of Ralph J. Clawson.)

A. I had never met Mr. Marco until we started to deal with the New York office, and then he came in.

Q. What was the occasion for your meeting Marco?

A. Mr. Marco said that he thought I didn't want to rent the property and I was holding up the contract.

Q. When did this take place?

A. I think that was on a Wednesday before we started to work on Friday.

Q. That was about—

A. This was a couple of days before the contract. [181] I asked to meet Mr. Marco, and we had a meeting in his office, and I told him that we would wire the New York office saying that I approved of it. Mr. Marco sent the wire out of his office. And then later on in the day they started further calls to New York, and I think the contract was executed and made from there, or with the representatives in New York, and they telephoned me from New York what equipment I should give them.

Q. Did they give you in their telephone conversation a list of the equipment contained in the contract?

A. They gave me a list, and the next morning they came through with a wire confirming what I should give, and the contract came through a couple of days later.

(Testimony of Ralph J. Clawson.)

Q. What were you doing out at Baldwin Park during this time?

A. I had charge of the winter quarters, looking after rental of the property and trying to secure a livelihood for us.

Q. Was anyone out there doing anything with relation to this Great American Circus?

A. At that time?

Q. Yes. A. Mr. Eagles was there.

Q. From about the 19th of May on?

A. I would say the 19th, yes, and Mr. Daillard, both was there. They would come early in the morning and stay [182] late at night.

Q. What did they do?

A. They selected property, and we would look over equipment, and we would decide on one wagon, and of course we would figure the space, and we was all working together. Then we changed the wagon lists around, and spent considerable time figuring what wagons we would have to have to hold the equipment.

Q. And you finally delivered six or seven wagons in excess of the number called for in the contract?

A. Yes. I think, if I remember right, it was nine wagons over. At the last moment Mr. Daillard—previous to that Mr. Daillard had hired wagons from a firm named Potter, in Alhambra, what was known as the Springer Wagon, a wagon for the light plant and two canvas wagons, which was formerly the property of Hagenback-Wallace, and this

(Testimony of Ralph J. Clawson.)

party out there bought the property.

Q. It didn't belong to you at that time?

A. No. So the day before we was supposed to leave Mr. Potter cancelled his agreement with Mr. Daillard and me also. So we had to get extra wagons and rearrange our whole load then. So we gave them additional wagons.

Q. You did that without authorization from New York, on your own motion?

A. Yes, on my own motion.

Q. And on their request? [183]

A. On their request.

Q. And that amounted to approximately nine additional wagons? A. Yes.

Q. The contract did not call for a cook house?

A. No.

Q. And you just gave them that of your own motion?

A. Yes, they wanted to take it, like the ladders, the swinging ladders; I had no contract for that.

Q. At their request?

A. Yes, on the request of Mr. Daillard and Mr. Eagles.

Q. Now then, you did a lot of work around there during that week?

A. Night and day, yes, sir.

Q. To get this stuff in condition?

A. That is right.

Q. Did you do any painting of the wagons?

A. Yes.

(Testimony of Ralph J. Clawson.)

Q. You painted in "Great American Circus", instead of whatever was on there before?

A. We lettered all the wagons "Great American Circus," and we hired a company in Baldwin Park to come up and spray the wagons and letter them "Great American Circus." We also painted the train, the cars, which said Hagenback & Wallace. We went over it for them in color. The color was selected by Mr. Eagles. [184]

Q. You spent a considerable sum of money in that connection?

A. I would say on paint alone we run considerably better than \$500.

Q. Now, you had an opportunity to examine these wagons yourself, did you not? A. Yes.

Q. And you knew of their condition?

A. Yes.

Q. With respect to the same, and as to the 20 wagons that were contained or referred to in the contract, when they were delivered over at Inglewood, California, were they in good condition and ready for use?

A. They was in usable condition and could be used, yes.

Q. And they were used wagons?

A. They were used wagons, yes, had been on the road. Some of the wagons I helped build myself.

Q. Was that also true of the condition of the tent rigging, blocks, falls and chairs?

(Testimony of Ralph J. Clawson.)

A. It was in good condition, but had been used.

Q. Was that also true of the train flat decks and runs?

A. There was one or two places on top of one of the decks was a little bit bad, so Mr. Daillard and I, we looked it over out at Baldwin Park, and he said, "Well, we will get that over in Inglewood," and we fixed that up down at San Diego, and when the report on the train come from the [185] Pacific Electric or the Santa Fe, they come out and give us a clearance on it.

Q. Inspected it and tested it for operation?

A. Yes. And I am pretty sure Mr. Daillard was there, because he called me—I was in Mr. Garrett's office downtown, and Mr. Daillard telephoned in to me that the inspectors would like to have me out there when they made the inspection.

Q. What was the condition of the calliope when it left Baldwin Park?

A. I think it was usable.

Q. What occurred with relation to the calliope when it was attempted to be moved from the wagon onto the bandstand?

A. It dropped. We had property boys that dropped the calliope.

Q. After that had been taken off of the train at Inglewood?

A. Yes. This calliope rode in a large wagon, and the back end had a large endgate, and they



(Testimony of Ralph J. Clawson.)

had these boys there, and they put them on unloading this, and they dropped this piece of equipment.

Q. And it did not play for the rest of the term of the circus?           A. No.

Q. Did you know anything about the elephant howdahs?

A. Yes. We had altogether at Baldwin Park 12 howdahs, [186] and there was four or five of them over at M. G. M. Studio, and they was making a picture over there—I think the name was “Lady of the Tropics,” with Hedy Lamarr. So after the howdahs went over there, Mr. Rogers, the art director, decided that they would build their own howdahs, something more elaborate, and so all the howdahs was laying over there, and the elephants that Mr. Eagles and Mr. Daillard selected did not carry howdahs anyway.

Q. Was anything ever said about these elephant howdahs?

A. They asked for them, said just have them around in the back here, but they wanted the larger elephants.

Q. Did they ever ask that they be delivered?

A. Yes.

Q. When was that?

A. I believe in Inglewood, and Mr. Eagles said, “I will go out and pick them up in one of my trucks, at the studio.”

Q. And as far as you were concerned, you were not directed to get those howdahs?

(Testimony of Ralph J. Clawson.)

A. By nobody, no, sir.

Q. How many howdahs were included in that contract?

A. Well, you see—I will explain that to you. We have 23 elephants, and first Mr. Nelson selected, he selected the elephants, and said he wanted those elephants, and we had to give him smaller elephants to go in our supposed number, so he selected those elephants, and you have to break an elephant to carry a howdah, and Mr. Daillard [187] was out there and figured, “We will have to have a lot of power around the show, so we had better take those bigger elephants, and just so we have blankets for them it will be all that is necessary.”

Q. They would not carry howdahs?

A. No.

Q. They were not trained to do that?

A. No.

Q. Did you have an opportunity to examine the wardrobe?      A. I did, yes.

Q. What was its condition?      A. Usable.

Q. Usable?      A. Yes.

Q. What was the condition of the sleeping cars?

A. The sleeping cars had mattresses, and they was clean and in good condition.

Q. But respecting the sheets, pillow cases and curtains, have you anything to relate to the court in that connection?

(Testimony of Ralph J. Clawson.)

A. They wasn't fully equipped on those, not with sheets and blankets, which wasn't customary, according to our contract; they wasn't supposed to be equipped.

Q. Were you supposed to do that? A. No.

Q. In the show business is it customary to rent the cars equipped with blankets, sheets and pillow cases? [188]

A. No, that is not the custom. I am going to illustrate. Last week I rented a car from Del McCoy, and all we had in it was just a mattress, and we never have blankets or sheets or pillow cases. We have the pillows, but not the—we furnish pillows and mattresses only.

Q. And in the circus business that is generally understood? A. Yes, sir.

Q. You arrived with all your equipment at Inglewod; is that correct? A. Yes.

Q. Of course, exclusive of the elephant howdahs referred to?

A. I think that is what was missing.

Q. Nothing was said about that at Inglewood?

A. Not a word.

Q. Now then, what occurred when you arrived there, as far as you were concerned?

A. After the equipment arrived there that morning I wired New York for advice, owing to the terms of the contract—I didn't pay much attention to the erecting of the equipment.

Q. It was all erected, however?

(Testimony of Ralph J. Clawson.)

A. Yes, all put up there. So they told me I was supposed to get another payment down at Inglewood.

Q. How much? [189] A. \$2500.

Q. Did you get it? A. I did not.

Q. Did you have any conversation with Marco about it? A. Mr. Marco and Mr. Daillard.

Q. What was that conversation?

A. I asked them, after the opening performance, about the money, so Mr. Marco says, "Yes, we will go out to the wagon and get it." So we started, and him and Mr. Daillard went in conference, and they said, "We will give it to you in San Diego."

Q. Was there any further conversation about it then? A. Not that night.

Q. Did you have any conversation at the same time about the notes?

A. The notes, they said, "Yes, we will give you the notes. Come in the wagon and we will give them to you when we get to San Diego in the morning."

Q. What else transpired prior to the time you left Inglewood, respecting you and Fanchon & Marco?

A. Mr. Eagles and Mr. Daillard, they came over and asked me to help Mr. Nelson put the performance together.

Q. Do you know what the occasion for that was?

A. They was having some trouble getting the acts in the big show.

(Testimony of Ralph J. Clawson.)

Q. That was in the matter of the production of the show [190] itself?

A. The performance, the production, yes.

Q. Will you relate just what that trouble was?

A. Mr. Marco came to me and said, "I have had everybody else around here this morning trying to get me a rehearsal," and he said, "Can you get me a rehearsal," and I said, "I will be very glad to help you." So we started in and got a skeleton rehearsal, about 35 or 40 minutes. And then Mr. Marco and I personally rehearsed the balance, with his suggestions. So he said, "I would like to have you go with us and help us put this performance on each day, the act."

Q. What did you say to that?

A. I said, "All right, I will try to make it."

Q. Was anything said respecting your salary?

A. Yes. He said they would give me \$50 a week.

Q. In what capacity?

A. Equestrian director.

Q. What did you say then?

A. I told him that I was on the pay roll of the people in New York at that time, and Mr. Eagles said it was all right, "You will have additional expense, anyway," so I said I would accept it.

Q. From that time on you acted as ringmaster?

A. That is right.

Q. Until it closed?                      A. Yes. [191]

Q. Did you receive your payments?

A. I did.



(Testimony of Ralph J. Clawson.)

Q. \$50?

A. Yes, sir, that is, right from Baldwin Park.

Q. From Roy Wolff? A. The treasurer.

Q. The treasurer? A. Yes.

Q. After the show was closed, in Baldwin Park?

A. Yes.

Q. As soon as you undertook the job as ring-master, the performance went off in Inglewood?

A. Yes, sir.

Q. And you went to San Diego? A. Yes.

Q. And what transpired there?

A. At San Diego one of the conditions—I remember the road was in very bad condition, and Mr. Eagles went ahead with the train, and I drove my car through, and I think I got in town at 6:00 or 7:00 o'clock at night, just after the day they closed in Inglewood, and there was a lot of sand there, and so Paul said, "We are going to work until it gets good and dark and put the show up in the morning."

Q. Was that done? A. That was done.

Q. Did you see Mr. Marco down there? [192]

A. I see Mr. Marco the following day, yes.

Q. Did you have any conversation respecting the \$2500 and the four notes? A. Yes.

Q. What was that?

A. Mr. Marco—we was sitting in the seat together, and he said, "Yes, we are going to give it to you." He said, "Do you know anything about our contract, how far up north we are going?" And I said I had no information of this contract. And

(Testimony of Ralph J. Clawson.)

he said, "We are not very well pleased with some of the contracts we have made up north." I guess he was referring to the northern part of the state. He said, "We practically give the show away up there some places," and he said, "I doubt if this thing will ever pay. We can't take in any money under these conditions." And so I asked for my \$2500 again, and he told me, he says, "We will give it to you," and, well, I didn't get it.

Q. Did he say when?

A. He didn't say, Mr. Marco, until Pasadena. The rest of my conversations was always with Mr. Daillard. He was supposed to be the executive chief.

Q. The next conversation, where was that, with Daillard?

A. That was in Santa Ana.

Q. When?

A. Following after San Diego.

Q. What was said? [193]

A. I said, "I must have that money to send in to New York." And so Mr. Daillard said, "Well, we have spent quite a bit of extra money repairing some of this equipment," and he said, "We will take that out of the first payment." I said I wasn't promising to do that. So at Pasadena, being a holiday, things was more or less confused over there, and Mr. Marco was there in the afternoon, and I think I talked to him a little while.

Q. At Pasadena?

A. At Pasadena.

Q. Then that Daillard conversation that you just related was at Santa Ana, or, first, the Marco one at San Diego?

(Testimony of Ralph J. Clawson.)

A. San Diego, Daillard, yes.

Q. And Pasadena?

A. And at Santa Ana I talked to Mr. Daillard about the money, but I didn't ask Mr. Marco for it at Pasadena, and the next day the show closed.

Q. You had no conversation at Pasadena?

A. No.

Q. Did you say anything at Pomona?

A. I asked Mr. Daillard for it three times during the morning and afternoon performances.

Q. What did he say?

A. He said, "We are going to straighten this up right away in New York." [194]

Q. That was the last conversation?

A. I wired our New York office for information that afternoon, and that night the show closed.

Q. Did you ever make any further demand on—

A. I went back to see Mr. Marco at his office the next day after the show closed, and talked to him about it some.

Q. What was said by you and by him?

A. I asked him, "What are we going to do about the payments, Mr. Marco?" And he says, "I don't know." He says, "The show is not on the road," and we had a lot of trouble, and there was some talk of the show reorganizing, and of course it never materialized.

Q. Did he offer you a job if they reorganized?

A. Yes, he talked—said he would like to have me.

(Testimony of Ralph J. Clawson.)

Q. The show went off on schedule at San Diego.

A. Yes.

Q. And at Santa Ana it was delayed, or did you miss the matinee?

A. At Santa Ana I think the matinee was called off by the management.

Q. Did you have occasion to observe the reason for the calling off of that afternoon performance?

A. I didn't, really. Over there it seemed to be a delay about getting the equipment up on the lot. They was moving around rather slow and seemed short-handed. I would say that was the cause of it.

[195]

Q. What can you state about the experience of the help?

A. Well, the heads of departments was very capable men.

Q. How about the general rank and file of the workers?

A. Well, they was a very poor class of men, much more unusual than you see around a circus. We most generally hire young boys, around about 25 or 30, and they do all right, and we had men more like 50 or 60 years of age, and people were going and coming over there——

Q. What about the condition as to loading of the circus? Did you have sufficient wagons to handle all equipment?

A. I don't think they did until they took on extra equipment in Inglewood.

(Testimony of Ralph J. Clawson.)

Q. How much extra equipment did you take on there?

A. We had to make a whole wagon complete for the Fanchonettes. They have got a big involved act. I think there were 24 girls, and every one carried a lot of stuff, and the stage came on there, and we had all the trunks that come in for those big acts, that never come to Baldwin Park. Most all that was added.

Q. Did that result in overloading?

A. To a certain extent it did, yes.

Q. In Pasadena did you have occasion to observe the working of the main fall there?

A. I noticed they got the line fouled once or twice there. [196]

Q. There were elephants pulling that line?

A. They pulled the cable. The cable goes through the block, and sometimes the cable will foul.

Q. Has an elephant sufficient strength or power to pull a rope like that in two?

A. An elephant don't know his strength when he starts to pull.

Q. You believe they could pull the main fall in two, though?

A. Yes, I believe he could, very easily.

The Court: You say an elephant is the motive power?

A. That pulls the fall up, your Honor?

The Court: And the rope got fouled?

A. It got fouled in a block.



(Testimony of Ralph J. Clawson.)

The Court: Where did it tear, between the elephant and where?

A. It broke once right on the No. 1 bail ring, and going through the block there it got fouled.

The Court: And broke right at the block?

A. I think so. It is pretty hard to tell, but that is the way I think. And they tie that right onto the bail ring.

Q. By Mr. Combs: That was chained on after the fall broke at Pasadena?

A. Yes.

The Court: Are you through? [197]

Mr. Combs: Almost. Just a moment, if your Honor please.

Q. By Mr. Combs: Then you went to Pomona, after Pasadena? A. Yes.

Q. Did the show go on on schedule there?

A. I didn't keep the time on the performances, but I think the performance started along about 3:00 o'clock. I wouldn't want to say.

Q. It went on more or less on schedule?

A. Yes, sir.

Q. You are often 20 minutes to a half hour late, aren't you?

A. On some days. Of course it doesn't occur every day, but it happens. The first part of the season you are more or less late in arriving and getting your equipment in shape.

Q. And equipment, that is to say, circus wagons, quite frequently have hot boxes on the road?

(Testimony of Ralph J. Clawson.)

A. In recent years it has. All this equipment was built back along to be drawn by horses, all old iron-tired wagons and boxings and axles in there, and when you use too much power, in place of going at four miles an hour, probably the trucks will run up to ten or twelve miles.

Q. Or maybe more than that?

A. Yes, maybe. With the Great American Show we [198] didn't have our own drivers. They hired local trucks.

Q. Did they run faster than the four or five miles an hour that such wagons will take?

A. Yes, considerable. They probably run 15 or 20 miles.

Q. In this Great American Circus?

A. Yes. I stopped them several times. I think Mr. Daillard and I were standing out there, and stopped two drivers for going out of the lot too fast.

Q. And that would result in hot boxes?

A. Yes, sir. Of course, that was a long haul. It is quite frequent on a show as big as the Ringling Show, to have one or two hot boxes a day. If any of them get hot, we call a greaser, and they go around and grease those wagons, and sometimes they may skip a wheel or something, and whenever you get the motive power to it you always have this trouble.

Q. At Pomona did there occur anything with relation to the Actors' Federation of Labor union, that you observed there?

(Testimony of Ralph J. Clawson.)

A. Yes. A representative of the Actors' Association pulled out the Fanchonette out of the show, and I think it was Walter Guice, and he blows the organization and his act, and I am pretty sure the band was union and said they would have to go out also.

Q. By "pulling out" you mean go on a strike?

A. No, just pull out from working. We wasn't union. [199] We wasn't an organized show.

Q. That actually occurred within your knowledge at Pomona?      A. Yes.

Q. So that you lost Guice, the band and the Fanchonettes?

A. We would have lost them if we had went on at all.

Q. And did you go back to Baldwin Park the next day?      A. That is right.

Q. Respecting the runs on the flat cars, were they in good or bad condition?

A. The runs was in good condition.

Q. Do you know that of your own knowledge?

A. I know that of my own knowledge, because they was brand new runs made in 1938, 38 inches wide. It was very good equipment.

Q. Did you observe the fact that the pole wagon jumped the runs in Santa Ana?

A. No. I wasn't there.

Q. When a car or wagon jumps the runs, in circus parlance, what does that mean?

(Testimony of Ralph J. Clawson.)

A. That means sometimes that your deck poler, the wagon itself, in other words, it is fastened to the wagon, and a man walks along like this and guides this pole, and sometimes he might get it to the edge, and when he makes a stop, he steps to one side, and the pole might jerk a little. [200]

Q. And it just runs off the runs?

A. Yes. It is not very often that it happens. And this boy is apt to step aside, and one wheel will go off the run, because it can run off. [201]

#### Cross Examination

Q. What condition would you say this equipment was in?

A. I would say it was in usable condition, all used equipment, though.

Q. Would you say it was in good condition?

A. Usable.

Q. I am asking you if you think it was in good condition.

A. I think it was good enough to use, yes.

Q. You would say it was in good condition and ready for use?

A. It can be used. It is not new property.

Q. I would like to have you answer me specifically on that question. I am asking you if, in your opinion, it was in good condition and ready for use?

A. I would say the property was all in shape so it [207] could be used.

(Testimony of Ralph J. Clawson.)

Q. Will you answer that yes or no, please?

The Court: Just answer the question that he is asking.

Q. By Mr. Schaefer: Did you consider the equipment in good condition and ready for use?

A. I do, yes. It could be used. That is as far as I can tell. It could be used. As far as good condition, I don't know just how you mean that.

Q. You are familiar with circus equipment, aren't you? A. I am, yes.

Q. And you knew the purpose for which the defendant was going to use the equipment, didn't you?

A. That is right.

Q. And in your opinion it was in good condition for that purpose?

A. It could be used for circus purposes.

Q. It was in good condition for that purpose?

A. It was in usable condition for that purpose.

[208]

Q. Now, when did you begin working on that equipment? A. We started——

Q. The day of the week.

A. I think it would be about a Thursday.

Q. Thursday of the week preceding; is that right? A. That is right.

Q. What else did you do from Thursday until the time that equipment moved into Inglewood?

A. We painted the wagons and fixed up corner chains and ropes, and whatever we could do on it.

Q. Tell me what else you did, if anything.



(Testimony of Ralph J. Clawson.)

A. We got—we brought up a cook house wagon, equipped with boilers and general stuff, painted the equipment, painted the poles.

Q. Anything else you did besides the cook house and the painting of the equipment?

A. Yes. We had the wardrobe cleaned, sent it to the cleaners out at El Monte, I think. We fixed up electrical equipment, and had our men out there working night and day.

Q. What electrical equipment?

A. Cables and lines, etc.

Q. The defendant didn't take the electrical equipment provided for in the contract?

A. No, they didn't take that. [210]

Q. What electrical equipment was there that they took, that you did work on?

A. The cables and falls and stuff like that.

Q. Any other work that you did?

A. Yes. We painted the wagons. I have stated that before. We fixed all the wagons underneath, the gears; we straightened the gears up on the wagons and tightened all the connecting rods which was necessary.

Q. How many men were employed for that purpose or working on it?

A. We had, I would say, out there, roughly, probably a hundred.

Q. Working on the equipment?

A. Yes, working on the equipment.

Q. Getting it in shape?                      A. Yes, sir.

(Testimony of Ralph J. Clawson.)

Q. Was there any work done on the runs?

A. Yes, the runs, the boards on the sides, was tightened up to pull them together. The runs was in good condition before.

Q. What about the cars?           A. Which cars?

Q. Flat cars. What was the condition of the decks?

A. The decking wasn't in bad shape. There was probably one or two places that was weak, but as a whole it was in good condition. [211]

Q. They were completely re-decked, weren't they, some of them, at San Diego?

A. No, they was not.

Q. How many cars?

A. I couldn't tell you what they did on that.

Q. You say the sleeping cars were not equipped with blankets or sheets or pillow cases?

A. Not complete. We had some.

Q. You say the custom in that regard is to furnish them with mattresses only?

A. Yes, and built-in berths.

Q. But you do furnish them with mattresses?

A. Yes.

Q. Did you not have a conversation with Mr. Daillard and Mr. Eagles, at which time they asked you about the berth equipment?

A. At winter quarters I told them—Mr. Daillard said we was supposed to equip the cars complete, and so I told him I didn't think so, because we didn't have the equipment. I gave them a list of what

(Testimony of Ralph J. Clawson.)

equipment we had, so he said, "We ought to go get hold of some stuff anyway, and we will straighten this out later." So I didn't get any.

Q. Didn't you tell him you would try to get some?      A. No, sir.

Q. Didn't you attempt to do so? [212]

A. Mr. Eagles called up the United Tent & Awning Company, and they said, "Who do you want this charged to?"

Q. Isn't it a fact that you called the United Tent & Awning Company first and attempted to obtain some blankets?      A. No, sir, I did not.

Q. On no occasion?      A. No, sir.

Q. Did you tell Mr. Daillard to procure the equipment?      A. I did not, no, sir.

Q. Did you have elephant howdahs out there?

A. They had five at M. G. M., four or five, and we had eight in the winter quarters left.

Q. Were those usable?

A. Every one of them, yes. [213]

MARCO WOLFF,

called as a witness in behalf of defendant, being first duly sworn, testified as follows:

Direct Examination [219]

DEFENDANT'S EXHIBIT No. 15

Western Union

TWS MW PDI—Mr. John Ringling North

Ritz-Carlton Hotel

New York, N. Y.

Strongly recommend rental to Fanchon & Marco. They are playing under some well known charity auspices out here. I have tried to liquidate our property out here and so far have not been successful. This rental will show us a good revenue as you know we are at a tremendous expense now. We will also have elephants, wagons, and cars for other rentals on the Coast. I worked out the price of sixteen hundred a week with Mr. Nelson, Fanchon and Marco's representative. Their admission prices are small, twenty-five and fifty a day, and they are really not in a position to pay any more. Was informed late this afternoon that they can get equipment from Rochester, Indiana to play the dates. Kindly advise me your opinion at once as I do not think we should lose this business. Regards.

RALPH CLAWSON.

[Endorsed]: For identification Deft. Exhibit No. 15. Marked Nov. 27, 1940.

(Testimony of Marco Wolff.)

A. Daillard told me that the calliope didn't work, and he said the rigging was in bad shape, the seats were in bad shape, the wagons needed a lot of work done to them, the cars on the trains needed a lot of work done. And he took me around and showed me—Daillard took me and showed me a lot of the bleacher seats without any backs on the back of them, and there was one entire section without any cross pieces at all. Later my insurance agent saw these seats and the equipment, and told me that I couldn't possibly get insurance for it.

The Court: Whatever the insurance agent told him a few days later on wouldn't be material. You can't do that. [231]

The Witness: This was at the time I was out there.

The Court: No. Just this conversation between you and Daillard and Clawson. Clawson was present when this conversation was had between you and Daillard?

A. Yes. Clawson told me that he would get the calliope fixed right away, and that the additional cross pieces for the seats would come out, and the elephant howdahs were not there, and he said he would get us the elephant howdahs right away. He said he didn't have any money and he couldn't fix up the railroad cars, that his credit wasn't good for that, and he asked us to advance the money for that.

The Court: Asked you?

A. Yes. And he suggested that we could deduct



(Testimony of Marco Wolff.)

from our first payment any advances that we might have to make. There were quite a few purchases that had to be made for rigging and hardware and rope, and he said he would be ready with the show. But our rehearsal, which was for 9:00 o'clock originally, and then 10:00 o'clock, and then 11:00 o'clock, and 2:00 o'clock, and 5:00 o'clock, and 8:00 o'clock at night, we still had no rehearsal. The equipment wasn't ready the entire first day. The tent was up, and so I told the performers the following day to have rehearsal in the morning, so that we would have a rehearsal before the matinee went on, but again they were busy trying to make repairs on rigging. I know one of the performers, Tiny Kline, refused to go up in the rigging with her ring [232] act, because she said she would break her neck. And there were continual postponements, which I reported continuously to Clawson, and finally, about 30 minutes before we had to open the tent for the customers, we were able to just run through the opening part, and just walk through. We couldn't actually go through the rehearsal properly. The calliope, which is a very important part of the musical part of a circus, was never usable. And we had to let a number of people sit right off the main track without seats to sit on. I complained to Clawson about it, and he said he would get it in shape. And they had a 3-day stand in San Diego, with a day in between, and he thought he could get it in shape for San Diego. And I told him I wouldn't pay him until he would get it in shape. [233]

(Testimony of Marco Wolff.)

A. I told Clawson that I was very dissatisfied with the equipment, that it had taken us a day and a half to get it up, that we had spent over a thousand dollars already in putting things in shape that he was supposed to spend in order to deliver it to us in good shape, that much of the equipment had not been used, that some of the performers had refused to go up on the rigging because it was unsafe, and they didn't wish to risk their necks. I told him that we were tremendously involved with sponsors. I even told him about our deal with the Chief of Police in San Francisco. And I told him if we couldn't do any better, if it took us a day and a half to get the show up, I didn't see how we could make our next move, although I had left a day open between Inglewood and San Diego, but beyond San Diego I didn't see how we could possibly put our circus on safely and meet our performances, if Mr. Daillard or Eagles would come and ask for another purchase order or for some cash. And Roy Wolff—we had to send to our studio several times and get a large check cashed, and he would have to be spending out tens and twenties and thirties and hundreds.

[237]

#### Cross Examination

Q. Then you sent a telegram to your sponsors?

A. Yes, sir.

Q. And that telegram is contained in this Exhibit 14, reading as follows: "Kramer of American Federation of Actors has called out acts which are

(Testimony of Marco Wolff.)

members of his organization. This and other labor difficulties which have caused us to miss matinee performances in Santa Ana and Pasadena necessitates us advising you with regret we will be unable to fulfill contract for circus performance. One of our men will contact you later. Fanchon & Marco, Inc."

You sent that to these named sponsors?

A. Yes, sir. [264]

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MRS. PATTY HACKETT,

called as a witness on behalf of defendant, being first duly sworn, testified as follows:

Direct Examination

Q. By Mr. Schaefer: Mrs. Hackett, what is your business or occupation?

A. I have charge of the Fanchonettes and am one of them.

Q. Mrs. Hackett, do you recall the Great American Circus in May of 1939?           A. I do.

Q. Were you in that show?           A. Yes, I was.

Q. Did you take part in the Fanchonette show of that circus?           A. Yes.

Q. Did you travel with the circus?   A. I did.

Q. In the sleeping cars?           A. I did.

Q. Did you have occasion to go into the sleeping cars of the circus?   A. Yes.

Q. When did you first go in, at what time or place?           A. In Inglewood, where we opened.

(Testimony of Mrs. Patty Hackett.)

Q. Will you tell us the condition of the sleeping car [275] you occupied?

A. Yes. The berths that we slept in had no curtains, and there were no springs on the berths. There were just wooden boards, with straw mattresses on them, and they had evidently been in storage for quite some time, because there were lumps in them.

Mr. Combs: The statement that they had evidently been in storage for some time was a conclusion of the witness.

The Court: Well, she says there were lumps.

The Witness: I came to that conclusion because of the——

The Court: Answer the question.

Q. By Mr. Schaefer: Just state what you saw. What was the condition of the mattresses?

A. They were in very poor condition.

The Court: That isn't it.

Q. By Mr. Schaefer: Tell us whether they were smooth or lumpy?

A. They were lumpy, and they were all downs and ups, and you couldn't sleep on them. It was practically impossible to.

Q. Were there any toilet facilities.

A. Yes, and they were in very bad condition.

Mr. Schaefer: I will stipulate that that may go out. When you say "in very bad condition" you are testifying to your conclusion. And the court doesn't know what a bad condition may mean. [276]

(Testimony of Mrs. Patty Hackett.)

Q. By Mr. Schaefer: Will you tell us what the condition was? Was there running water or not, and were they clean?

A. There wasn't running water, and the lavatory, the toilet in there could not be flushed, because of that reason, and it had been used, and we could not use it afterwards, because the refuse was still in there.

Q. Did you sleep in the car? A. I tried to.

Q. Is there anything else you can tell with respect to the equipment? A. Yes.

The Court: That is too general.

Q. By Mr. Schaefer: First, tell me what equipment you are speaking about—in the sleeping car?

A. In the sleeping car.

Q. Proceed.

A. Yes. The windows wouldn't stay open. We had to prop them open to get air, prop them open with a Coca Cola bottle.

Q. Anything further with respect to the nature of the equipment? A. I believe not.

Q. The sleeping car or otherwise? How many girls were in the car with you?

A. There were 20. [277]

Q. Did you examine all the berths, or those occupied by the Fanchonettes?

A. I was in several of them, yes.

Q. Were they all in the same general condition?

The Court: What was the condition of the balance of them?



(Testimony of Mrs. Patty Hackett.)

A. They were all practically the same. I didn't examine them minutely, but they seemed to be all the same.

Mr. Schaefer: Any cross examination?

Cross Examination

Q. By Mr. Combs: When did you arrive at Inglewood?

A. I don't remember the exact date.

Q. Was it the day of the first performance?

A. Yes, I believe so, or the date previous to the opening day.

Q. The cars, however, were in Inglewood when you arrived? A. I don't know.

Q. They were in Inglewood when you first saw them, were they not? A. Yes.

Mr. Combs: That is all.

The Court: Call your next witness.

Mr. Schaefer: I have, your Honor, six additional witnesses who were in the Fanchonettes, whose evidence will [278] be cumulative, and I take it your Honor does not care to have that produced?

The Court: Do you concede that these witnesses would testify the same way?

Mr. Combs: Substantially as this young lady did.

Mr. Schaefer: I have here Miss Lorraine Roberts, Miss Virginia Perkins, Miss Mary Carr, Miss Ruth Barr, Mrs. D. G. Douglass and Mrs. Ann Weber, who will testify in the same manner.

Mr. Combs: If called, they would testify substantially as this witness did.

The Court: Yes. Call the next witness. [279]

TINY KLINE,

called as a witness in behalf of defendant, being first duly sworn, testified as follows: [280]

Direct Examination

A. The mattress was lumpy and very thin. And the runners in the aisle at this particular place in front of my berth had a big hole about maybe two feet broken out, and you could stumble in it easy, and it was unsanitary.

Mr. Combs: That is a conclusion of the witness.

The Court: Proceed.

A. And one toilet assigned to the ladies was just a toilet, with no running water, and the wash basin in it was so close that it would only hold one person. While one girl would be washing in there, no one could utilize the toilet, and that, of course, was an inconvenience to everybody.

Q. By Mr. Schaefer: Was there running water?

A. In the wash basin, yes.

The Court: Was there water to flush the toilet?

A. No. And the wash basin, which was really supposed to be for the girls to make their toilet, was utilized by the porters to shine the shoes, and therefore we had only [285] one toilet and wash room, and it was very bad. [286]

## WAYNE DAILLARD,

called as a witness on behalf of defendant, being first duly sworn, testified as follows: [288]

## Direct Examination

Q. By Mr. Schaefer: What did you see?

A. I saw splintered decking, splintered timber.

The Court: Tell us what you saw.

A. I saw the decks splintered, with holes in them, places that were worn.

Q. By Mr. Schaefer: Were they repaired at San Diego?      A. Yes.

Q. Did you discuss this with Mr. Clawson?

A. Yes. I got the report on that from Mr. Beeson, I believe his name was, and also from Mr. Eagles, and I went down and looked at them, and I called it to Mr. Clawson's attention. At that point Mr. Clawson had refused to do any more at San Diego, as he said he had no authority to spend any money until the situation had been worked out. I said, "Well, I am going to have the train decks repaired of necessity, and I am going to hold Hagenback-Wallace for it."

Q. You said that to Mr. Clawson?

A. Mr. Clawson.

Q. At San Diego?      A. At San Diego. [298]

Q. Did you see any of the wagons empty out from the train?      A. Yes.

Q. To the lot?      A. Yes.

Q. Did you observe any of them in difficulties?

A. Yes.

(Testimony of Wayne Daillard.)

Q. Will you state what you saw in that connection?

A. Yes. I was going from the lot downtown to lunch with Mr. Priest.

The Court: Just what you saw.

A. I saw a wagon boxing on fire.

Q. By Mr. Schaefer: How fast was the wagon moving?

A. We followed the wagon for about a mile, Mr. Priest and myself, and I would say four, or maybe five miles an hour.

Q. Did you see that wagon again?

A. Yes.

Q. When did you see it again?

A. An hour later, when we returned from lunch.

Q. Where did you see it the second time?

A. It had proceeded about a mile and a half, possibly.

Q. Was the matinee given in Santa Ana?

A. It was not. [299]

Q. Did you give the afternoon performance in Pasadena?      A. No.

Q. Do you recall any lines breaking in Pasadena, or falling of the tents?

A. Yes. I observed some lines break in Pasadena.

Q. Do you recall how many times that happened? Were you there?

A. The report was——

The Court: Not the report. What did you see?

A. I saw the tent, that is, the canvas, drop on

(Testimony of Wayne Daillard.)

three different occasions that I observed it. I couldn't, however, observe the cause of that.

Q. By Mr. Schaefer: You saw the tent fall, did you?

A. Yes.

Q. Did you have any conversation with Mr. Clawson with respect to that?

A. I don't recall any.

Q. Did you have any conversation with him with respect to the ropes?

A. Yes. In substance, that conversation was——

[300]

Q. That was in Pasadena?

A. In Pasadena.

Q. Was anyone else present besides you and Mr. Clawson?

A. I believe Mr. Eagles was present at that. As

A. I saw the tent, that is, the canvas, drop on a matter of fact, I think Mr. Eagles brought about the conversation.

Q. What was said by the parties?

A. In substance it was that I wanted, I asked, or maybe demanded—I don't know—that those ropes be renewed. We had very concrete evidence that there was something wrong with them, and Mr. Clawson again advised that he wasn't able to do anything in the way of purchasing ropes.

Q. Did he state why?

A. No, I believe not. [301]

Q. What was the condition of the wardrobe?

A. Very bad.

The Court: What do you mean by that?



(Testimony of Wayne Daillard.)

A. I mean the wardrobe was faded and worn, and I have seen a lot of wardrobe.

The Court: Well, just what you saw as to the condition it was in.

A. And incomplete.

The Court: In what respect?

A. There would be trousers missing to uniforms, or caps missing to uniforms, and turbans missing.

The Court: We could save considerable time if you would [302] just point out how many turbans were missing.

A. I can't do that accurately.

Q. By Mr. Schaefer: Can you tell us about what portion of the wardrobe was usable? We can arrive at it that way.

A. You asked me what condition the wardrobe was in, and I have handled wardrobes for years—

The Court: Don't argue. Just answer the questions.

A. I recall that we replaced, or bought, that were missing, duck trousers for the band; caps for the band; turbans for some of the entry acts.

The Court: The missing parts were supplied by you?

A. Yes, we purchased them.

Q. By Mr. Schaefer: Can you state now what percentage or proportion of the wardrobe that was furnished was usable, and what was not usable? Answer that yes or no.

A. Yes.

(Testimony of Wayne Daillard.)

Q. I will ask you what percentage of the wardrobe that was furnished was usable and what percentage was not usable?

Mr. Combs: That is objected to as calling for a conclusion of the witness.

The Court: I think from his answers to the questions awhile ago he is not qualified to answer.

Mr. Schaefer: I am directing it to the entire wardrobe.

Q. By Mr. Schaefer: Do you know the amount of wardrobe that was obtained from the Hagenback-Wallace Shows? Did [303] you see the wardrobe? A. Yes.

Q. Do you know what proportion of that was used?

A. There was about 75 per cent of what we took that we actually used.

Q. About 75 per cent? A. Yes.

Q. Were there any elephant howdahs supplied by Hagenback-Wallace? A. No.

Q. Was the calliope in operation?

A. No. [304]

---

### GLENN HALL,

called as a witness in behalf of defendant, being first duly sworn, testified as follows: [314]

#### Direct Examination

A. The chairs were all right. The plank they sit on, there was a number of them that were splin-

(Testimony of Glenn Hall.)

tered; the edges that were on the front of them or the backs, to hold the chairs, there were a number of them off, and it caused the chairs——

Mr. Combs: Just a minute. That is a conclusion.

Q. By Mr. Schaefer: What did you observe after the seats were erected with respect to the chairs? Did they set normally?

A. Yes. There was a few of the planks that had boards nailed over them so that they would set normally.

Q. Did you examine the bolts or nuts, or see them when you were erecting them?

A. There were a few of them that were replaced on the jacks, yes.

Q. Did you sleep on the train?

A. I did one night, yes.

Q. What was the condition of the car?

Mr. Combs: That is objected to as calling for a conclusion of this witness.

Q. By Mr. Schaefer: State what you saw or observed.

A. On the train, on the sleeping car, there were bunks that had small, thin mats, instead of mattresses on them, and they were hard and lumpy, and the windows on the car, you couldn't hardly open them. The one I was in I couldn't get the window open, so I rode on the flat car. [317]

Mr. Schaefer: Cross examine.

(Testimony of Glenn Hall.)

## Cross Examination

Q. By Mr. Combs: You wouldn't state that all the windows in the cars couldn't be opened, would you?

A. Well, in about four or five different bunks that I tried, I couldn't. [318]

## DEFENDANT'S EXHIBIT No. 16

## Great American Circus

## INCOME AND EXPENSE STATEMENT

Ticket Sales Including Tax	Inglewood.....	5/24/39	\$1,607.69
" " "	" San Diego .....	5/26/39	578.71
" " "	" San Diego .....	5/27/39	1,984.06
" " "	" San Diego .....	5/28/39	1,747.20
" " "	" Santa Ana .....	5/29/39	1,587.70
" " "	" Pasadena .....	5/30/39	864.47
" " "	" Pomona .....	5/31/39	804.80

Total Ticket Income.....\$9,174.63

## Misc. Income:

Banner Account .....	\$145.00
Milk Fund .....	11.59
Pie Car .....	16.99

Total Misc. Income..... 173.58

Total Income .....\$9,348.21

## Expense:

General Misc. Operating Expenses per statement.....	\$29,252.15
Cost of Equipment Repairs per statement.....	1,672.40
Settlement with Sponsors per statement.....	1,747.59

Total Expense .....\$32,672.14

Net Loss .....\$23,323.93

## GENERAL AND MISCELLANEOUS OPERATING EXPENSES

## To Whom Paid

## Kind of Expense

## Amount

Eagles Hay & Grain Co.	Electric Lamps .....	\$ 34.92
Eagles Hay & Grain Co.	Paint .....	1.19
F. Saylor	Truck Hire .....	28.60
United Tent & Awning Co.	Blankets .....	35.00
Eagles Hay & Grain Co.	Light Plant Rental .....	21.43
Eagles Hay & Grain Co.	Electric Lamps .....	142.31
Chas. G. Willis	Rental 6 Horses .....	60.00
Bill Nixon	Gasoline .....	8.00
Peter L. Ferry & Sons	Transportation tractor .....	20.00
Eagles Hay & Grain Co.	Light plant rental .....	150.00
L. E. Bramhall	Repair Light Plant .....	27.44
Baker-Lockwood Mfg. Co., Inc.	Rental tent .....	437.50
Eagles Hay & Grain Co.	Animal feed .....	82.38
	Cleaning lot etc. ....	52.36
	Cook house supplies .....	23.80
	Truck rental .....	96.50
	Sheeting & duck .....	27.61
B. Sheppard Co.	Stationery .....	24.98
Neilson Bros.	Leatherette Bow Ties .....	4.64
Industrial Garment Co.	Pants, suits and shirts .....	202.46
Cohn Goldwater Mfg. Co.		



To Whom Paid	Kind of Expense	Amount
Office Contingent Fund	Transportation men & travel.....	145.00
Brokaw Bauer Chevrolet Co.	Payment bill posting truck.....	154.50
Office Contingent Fund	Free Show for sponsors.....	121.10
Blanchard Press	Advertising paper.....	250.00
Anderson Tire Co.	Tire and wheel for truck.....	12.00
Wayne Dailard	Cash for misc. expenses.....	200.00
Joe Bren	Travel expense Neal Abel.....	50.00
Al's Gilmore Service	Gasoline.....	20.42
Ben Austin	Bill Posters' expense.....	100.00
Globe Ticket Co.	Tickets.....	41.10
Hollywood Printers	Release forms.....	4.12
Monte Orr	Drawings for ads.....	35.00
So. Pacific Co.	Travel Expense Ben Black.....	31.30
Alexander Stationery Co.	Rubber stamp and ledger sheets.....	4.38
J. B. Austin	For telegrams.....	3.79
Western Union Telegraph Co.	Neal Abel Travel Expense.....	25.00
P. P. Burch	Cash to W. Dailard for expenses.....	500.00
Pacific Freight Lines	Rent 4 trucks—1 week.....	210.00
Mitchell & Herb, Inc.	Advertising mats.....	26.01
Pittsburgh Paints	Bill posters' brushes.....	22.35
Roy N. Wolff	Change fund.....	600.00
Santa Fe Ry.	Transportation Circus.....	500.00
Fanchon & Marco Disbursement Fd.	Salaries per payroll.....	231.60
Western Union Telegraph Co.	Travel Expense R. Stapleton.....	75.00

To Whom Paid	Kind of Expense	Amount
Office Contingent Fund	Misc. Cash Expense.....	112.02
Western Union Telegraph Co.	Neal Abel Travel Expense.....	25.00
Bruce Merman	Booking Expense.....	75.00
So. Pacific Company	Circus Scrip books.....	290.40
Al's Gilmore Service	Gasoline.....	24.24
A. S. Chernoff	Stationery.....	34.76
Globe Ticket Co.	Tickets.....	85.17
Hollywood Sign Co.	Painting boxes.....	27.00
Pacific Freight Lines	Rental 4 trucks—1 Week.....	210.00
Railway Express Agency	Express on advertising paper.....	19.73
So. Pacific Co.	Lower berth Marie Carr.....	2.45
Office Contingent Fund	Misc. Cash Expense.....	126.10
Russell Stapleton	Travel Expense.....	37.20
Unit Transfer	Drayage.....	29.40
Fanchon & Marco Disburse. Fund	Salaries per payroll.....	437.50
F & M Service Corp.	Photographs.....	31.00
Larry Kaford	Travel Expense.....	119.30
Mimeographing Supply Co.	Mimeograph paper.....	6.80
Western Union Telegraph Co.	Travel Expense Neal Abel.....	25.00
Office Contingent Fund	Entertainment for sponsors.....	222.50
	Travel Expense.....	10.00
Western Union Telegraph Co.	Travel Expense Neal Abel.....	50.00

To Whom Paid	Kind of Expense	Amount
Roy Wolff	Cash for labor payroll.....	500.00
L. L. Cronkite	Bill poster's expense.....	73.33
P. P. Bureh	Cash for labor payroll.....	150.00
Fanchon & Marco Disburse. Fund	Salaries per payroll, acts, line girls, musicians, etc. ....	3,294.37
Karl Knudson	Travel Expense & water deposit.....	51.51
J. B. Austin	Travel Expense .....	28.07
Railway Express	Express advertising paper.....	21.94
So. Pacific Company	Railroad ticket J. Newman.....	16.60
Pacific Freight Lines	Rental 4 trucks—1 week.....	210.00
Roy Wolff	For cash advanced to Red Wagon.....	50.69
Ben Black	Travel expense .....	71.42
Tom Heney	Travel Expense .....	16.18
Metropolitan Engravers	Mats & zinc etchings.....	89.76
Postal Telegraph	Telegrams .....	12.87
Red Arrow Messenger Co.	Messenger Charges .....	11.35
So. Pacific Company	Railroad fare J. B. Austin.....	23.05
Western Union Telegraph Co.	Telegrams .....	125.50
M. E. Farnsworth	Expense after Circus closed.....	8.00
Fanchon & Marco Disburse. Fund	Salaries per payroll.....	25.00
Office Contingent Fund	Misc. Cash Expense.....	110.06
Henley Typewriter Co.	Rented typewriter .....	5.00

To Whom Paid	Kind of Expense	Amount
Unit Transfer	Drayage .....	12.40
Fanchon & Marco Disburse. Fund	Circus payroll .....	1,396.34
Office Contingent Fund	Misc. Cash Expense .....	48.56
Wayne Dailard	Travelling expenses .....	95.00
Harry F. Callan	Bill Posting .....	226.56
Continental Baking Co.	Groceries .....	12.00
Globe Ticket Co.	Tickets .....	552.92
Pacific Freight Lines	Balance due rental 4 trucks .....	290.00
So. California Telephone Co.	Long distance calls .....	274.35
Santa Fe Ry.	Tickets to San Diego .....	5.40
Fanchon & Marco Disburse. Fund	Salaries per payroll .....	234.29
Office Contingent Fund	Travel Expense .....	61.46
Green's Show Print	Advertising cards and paper .....	106.67
Green's Show Print	Advertising cards and paper .....	106.67
Green's Show Print	Advertising cards and paper .....	106.68
Wayne Dailard	Travel Expense .....	37.50
Fanchon & Marco Disburse. Fund	Circus payroll .....	55.00
Gay Goodin	Trucking 6 horses .....	6.00
Huggins-Young Co.	Cookhouse supplies .....	22.00
So. California Disinfecting Co.	Supplies—cookhouse .....	14.63
Blanchard Press	Advertising paper .....	2,000.00
Pacific Electric Railway	Switching cars .....	184.80

To Whom Paid	Kind of Expense	Amount
Rosen-Sidman Co.	Insurance .....	296.53
Fanchon & Marco Disburse. Fund	Salaries per payroll .....	26.67
Office Contingent Fund	Misc. Cash Expense .....	43.41
Unit Transfer	Drayage .....	11.70
Collector Internal Revenue	Admission taxes .....	1,013.13
American Airlines	Travel Expense .....	13.48
Bay Cities Laundry	Sleeping car expense .....	34.67
Foster & Kleiser	Bill board—Pasadena .....	48.00
Radio Station XEAC	Advertising—San Diego .....	25.00
Rosen-Sidman Co.	Insurance .....	1.00
Larry Kaford	Travel Expense .....	23.65
Alexander Stationery Co.	Rubber stamp .....	.96
Wayne Dailard	Telephone expense .....	10.95
Billboard Publishing Co.	Advertising .....	7.00
Mitchell May Jr. Co.	Insurance .....	2.50
Rex Wilson Art Service	Signs .....	9.79
Western Union Telegraph Co.	Telegrams .....	14.72
Office Contingent Fund	Travelling Expense .....	16.40
Office Contingent Fund	Travelling Expense .....	12.80
Office Contingent Fund	Travel Expense .....	4.55
Gilmore Oil Co.	Travel Expense Larry Kaford .....	23.65
Sunshine Laundry	Laundering shirts and coveralls .....	9.01



To Whom Paid	Kind of Expense	Amount
Eastern Wholesale Grocery Co.	Cookhouse Supplies .....	185.65
Billboard Publishing Co.	Advertising .....	14.00
Baker Lockwood Mfg. Co.	Balance due rental of tent.....	31.25
State & Federal Governments	Payroll Taxes .....	450.25
Various	Cash expenditures for operations made on Circus lot, per receipted bills.....	7,700.53
Laborers	Payroll—paid in cash on lot.....	2,950.64
Laborers	Ducie books refunded.....	6.70
Performers	Advanced in cash.....	255.47
	Total.....	\$30,821.35
Less cash advanced by main office and accounted for in \$7,700.53 figure above.....		\$ 1,569.20
	Net Total.....	\$29,252.15

## Great American Circus

## COST OF EQUIPMENT REPAIRS

To Whom Paid	Description	Amount
Los Angeles Hardware Co.	Rope, tools, etc.....\$	183.16
Los Angeles Hardware Co.	Rope, tools, etc.....	167.28
United Tent & Awning Co.	Rental stake driver.....	10.00
Lou Skeels	4 Chairs .....	8.24
Harper & Reynolds	Garbage cans & hammers.....	5.03
Elite Glass & Paint	Paint .....	14.16
M. H. Brown Uniform Cap Co.	Band caps & uniform caps.....	38.11
B. Sheppard Co.	Bed sheets & pillow cases.....	211.19
Grether & Grether	Blankets .....	100.43
United Tent & Awning Co.	Rental stake driver.....	10.00
Santa Fe Ry.	Taking cars to be repaired.....	55.00
Art Springer	Painting wagons .....	136.50
Ace Lumber Co.	Seat blocks .....	17.00
Arrow Key Service	Repairing safe .....	10.00
Century Lumber Co.	Lumber .....	104.83
Dan Dixon	2 Stools .....	2.58
Dohrmann Supply Co.	Dining car equipment.....	14.75
Ted Ducey	Truck hire .....	21.25
Ted Ducey	Truck hire .....	15.00

To Whom Paid	Description	Amount
Ted Ducey	Truck hire .....	10.00
Ted Ducey	Truck hire .....	15.00
Eagles Hay & Grain	Mill blocks .....	4.64
Hazard-Gould & Co.	Chain and cable .....	21.50
J. Fred Kahle & Son	8 Bridles .....	18.54
Kress Co.	Dining car equipment .....	1.18
Lawrence Lumber Co.	Lumber .....	13.61
L. A. Heavy Hardware Co.	Blacksmith equipment .....	11.04
L. A. Heavy Hardware Co.	Blacksmith equipment .....	11.62
L. A. Heavy Hardware Co.	Padlocks, candy stands for train .....	21.63
L. A. Heavy Hardware Co.	Rope .....	15.83
L. A. Heavy Hardware Co.	Bolt cutters .....	4.43
L. A. Heavy Hardware Co.	Machine bolts, etc. to Santa Fe Shops .....	16.89
Mayer & Boyce	Repairs to air pump .....	8.27
Marston Co.	120 Yards burlap .....	24.72
Sears, Roebuck & Co.	4 Garden Rakes .....	5.73
Hazard-Gould & Co.	Tools .....	11.04
Santa Fe Ry.	Repairs to cars .....	332.22
Total .....		\$1,672.40

Great American Circus  
SETTLEMENT WITH SPONSORS

To Whom Paid	City	Amount
Don Price	Fresno, Calif.	\$ 100.00
American Legion	Pasadena, Calif.	250.00
American Legion	Glendale, Calif.	150.70
B. W. Osterman	Santa Ana, Calif.	151.01
American Legion	Oakland, Calif.	98.88
American Legion	Santa Monica, Calif.	119.34
American Legion	San Diego, Calif.	80.53
Elks Lodge	Santa Ana, Calif.	62.30
Jack Horner	Long Beach, Calif.	200.00
Jack Horner	Long Beach, Calif.	25.00
Bakersfield Californian	Bakersfield, Calif.	33.38
Fresno Bee	Fresno, Calif.	49.93
Fresno Guide	Fresno, Calif.	11.34
Evening Outlook	Santa Monica, Calif.	46.34
Glendale News Press	Glendale, Calif.	57.12
Press Telegram	Long Beach, Calif.	63.00
Star Free Press	Ventura, Calif.	10.00

To Whom Paid	City	Amount
Glendale Star	Glendale, Calif.	12.45
State Display Co.	Fresno, Calif.	20.00
Air View Magazine	Santa Monica, Calif.	50.00
Long Beach Independent	Long Beach, Calif.	47.52
Foster & Kleiser	Long Beach, Calif.	90.00
Elks Lodge	Bakersfield, Calif.	8.00
Hancock Bros.	San Francisco, Calif.	10.75
Total		\$1,747.59



R. V. KETTRING,

called as a witness in behalf of defendant, being first duly sworn, testified as follows:

Direct Examination

Q. What is your position with the Santa Fe Railroad?      A. General car foreman.

Q. Did you have occasion to inspect and examine some circus cars of the Great American Circus in May of 1939?      A. I did.

Q. Did you make any repairs to those cars?

A. Yes, sir.

Q. Do you have any data there indicating the nature of the repairs and the number of the cars?

A. Yes. We have a complete——

Q. Where did you pick up those cars?

Mr. Combs: Excuse my interrupting you. We will stipulate that the Santa Fe made repairs of three hundred and some odd dollars. [336]

The Court: How much is that?

Mr. Combs: Three hundred and thirty-two and some cents.

Mr. Schaefer: Of course, it isn't, your Honor, the purpose to prove the amount with this witness. The purpose is to prove the nature and extent of the repairs, as one of the elements of the failure of the equipment. I have called this witness to show the condition of the cars. That is my point.

The Court: Oh, I don't care anything about that.

Mr. Schaefer: Well, I think it goes to the defendant's case very largely, your Honor, to show

(Testimony of R. V. Kettring.)

how extensive the repairs were. We have the testimony of Mr. Clawson that there were minor repairs made, to begin with, and I have a witness here to show what the nature of the repairs was, the man who did it.

The Court: The nature does not make any difference.

Mr. Schaefer: It shows the extent of the repairs necessary to the equipment, and their condition when they came from Baldwin Park, your Honor. It goes to that part of our case.

The Court: When was this inspection made?

A. Well, the final inspection on the cars was made on May 23rd, at our Santa Fe yards. The original inspection was made prior to that time. I do not recall the date. It was made at Baldwin Park. The inspection at Baldwin Park, you might say, was the preliminary inspection. [337]

Q. By Mr. Schaefer: What condition did you find the cars in?

A. We found the cars at Baldwin Park in what we would term, in a railroad term, as in fair condition, needing repairs to the safety appliances, air brakes, and the running gear of the cars, to make them safe to move.

Q. Will you state what repairs were made and give the car numbers, if you can, and state why they were made?

The Court: We don't need that. What other defects, if any, did you find in the cars?

(Testimony of R. V. Kettring.)

A. Well, I found several little defects that was in violation of the Interstate Commerce rules, if we would operate the cars over our lines, such as old air lines, wheels with worn flanges. And we had one coach that was—on request of the parties operating the show, they asked us to make repairs—it had a defect in violation of the Interstate Commerce rules, and these repairs were all made to the cars on our repair tracks, prior to their departure for San Diego. The cars were brought back from Inglewood to our repair tracks, and repairs were made.

Q. By Mr. Schaefer: Mr. Kettring, will you look through these bills as quickly as you can and tell me if they are the original bills that came from the Santa Fe to Fanchon & Marco?

A. Yes, sir, they are. They are the original bills.

Q. Do they show the nature of the repairs?

[338]

A. They show the nature of the repairs and why the repairs were made.

Q. And the cars on which they were made?

A. And the individual cars upon which they were made.

Q. That first yellow bill has the name “Kettring” on it. Is that your signature?

A. That is the signature of my clerk.

Q. Put there at your direction?

A. At my direction.

(Testimony of R. V. Kettring.)

Mr. Schaefer: We offer these bills in evidence for the purpose of showing——

The Court: Any objection?

Mr. Combs: I don't believe so. Is that the three hundred and thirty odd dollars?

Mr. Schaefer: \$332.22.

The Court: The same amount as in your bill?

Mr. Schaefer: That is right.

The Court: Let it be filed.

The Clerk: Defendant's Exhibit No. 17.





# DEFENDANT'S EXHIBIT No. 17

Santa Fe

## MEMORANDUM BILL

Los Angeles, Calif.

Station, May 24, 1939

The Great American Circus.

For repairs to cars 65, 85, 87, 80, 64, 83, 89, 88, 84, 82, 81, 52, 50, 45, and 46, Los Angeles, repair track  
May 23rd, 1939.

Items of Repairs	Amount	Items of Repairs	Amount
As per A. A. R. billing attached.			
Miscel. charges (Labor & mtl.....)	\$260.09		
Labor 26.4 hours @ \$1.25.....	33.00		
Labor 17.8 hours @ 1.40.....	24.92		
Labor 6. hours @ .42 1/2.....	2.55		
Wrot iron 168 lbs. @ 5 1/2¢.....	9.24		
Lumber 6 BM ft. @ 05¢.....	.30		
Spring steel 24 lbs. @ 5 1/2¢.....	1.32		
Mallable iron 10 lbs. @ 08¢.....	.80		
	<hr/>		
	\$332.22		

(Bill to be collected by Agent, Los Angeles.)

(Bill made on AAR basis )

Mr. Mendelsohn-cc-CRM, RT.

## CREDIT

LABOR		MATERIAL	
Account	Amount	Account	Amount
314	129.45	314	99.38
317	70.18	317	30.66
402P	2.55		

Note: To be forwarded to the Audit office.

R. V. KETRING  
General Car Foreman.  
AJP/RJ

M. M.



To Be Attached to Bill  
American Railway Association—Billing Repair Card

SANTA FE

Date May 23, 1939      Repaired at 612 Los Angeles,      Inspector R. V. Ketring,  
Car No. 65      Initial or Name Great American Circus      Kind Stock

End	Repairs Made	Materials				Labor				Sunds				Why Made
		Miscel.	Hrs.	Wrot. Lbs.	Lumber Ft.	Steel Lbs.	Mall. Lbs.	Cast Lbs.						
	Air brakes cleaned.....	4.53												
	8 Journal boxes repacked.....	3.50												
AL	One truck spring.....		.5			24								Broken
	Car jacked .....		1.											Repairs
B	Three brake beam safety bar bolts & L nuts 3/4x3.....	.60		2										Worn out
	One brake bell crank.....						10							Broken
	One bracket .....			7										"
	Two att. bolts and lock nuts 5/8x2 1/2".....	.40		1										Worn out
	One brake chain bolt 5/8x2 1/2.....	19												"
	One bell crank pin.....		.2	1										"
	Two cotter keys.....	.02												"



ASSOCIATION OF AMERICAN RAILROADS—BILLING REPAIR CARD. (Wheels and Axles)

WHEELS AND AXLES REMOVED					WHEELS AND AXLES APPLIED							
MAKER	Ry. Co.'s Initials on Wheel	WHEEL No. DATE CAST	Service Metal Before Turning	CAUSE OF REMOVAL	After Turning	MAKER	Ry. Co.'s Initials on Wheel	WHEEL No. DATE CAST	Full Flange Con-tour—Yes or No	SERVICE METAL	New or Second Hand	Net Charge
3-28	70	331	1 1/2"	Turn 1/2		3-3-17	8	955 H		1/2	SA	
030	None	49069	1 1/2"	74 T		24		1558				
✓	20	97	1 1/2"			✓		94 H		1/2	✓	
	None	45553	1 1/2"					1568		1/2	SA	
AXLE A. A. R. Non-A. A. R. } Length _____												
LOCATION		Size and Kind of Wheels		JOURNAL		Wheel Seat		CENTER		LABOR		
				Length	Diameter	Diameter	Diameter	Diameter				
K-23		Removed 38 1/4 W W 48		9	55	6 1/2	6 1/2	5 9/16		TOTAL		
		Applied 38 1/4 W 48		9	55	6 1/2	6 1/2	5 1/2				

  

Date	5-23-39	Repaired at	300 Bks. 9754	Inspector	J. H. H. H.
Car No.	83	Initial or Name	Wagon Wheel	Kind	Wheel Shop Inspector







To Be Attached to Bill  
American Railway Association—Billing Repair Card

SANTA FE

Date May 23, 1939      Repaired at 612 Los Angeles,      Inspector R. V. Ketrang,  
Car No. 80      Initial or Name Great American Circus      Kind Flat

End	Repairs Made	Labor			Spring		Why Made
		Miscel.	Hrs.	Wrot. Lbs.	Lumber Ft.	Steel Lbs.	
R&L4	One pair SH wrot steel wheels.....	8.32					Worn flange
	Two journal bearings 9".....	2.04					“ Out
	Two dust guards 9".....	.16	.4				“ “
	Four journal box bolts and lock nuts						
	1-1/8"x16.....	.16		23			“ “
A	One top rod repaired 22#.....	.46					Cut by axle
	Two conn. pins R&R.....		.4				Repairs
R2	One journal bearing 9".....	1.02					Worn out
	8 Journal boxes repacked.....	3.50					
	Air brakes cleaned.....	4.53					
	Labor .....		4.0				Wheels etc.

Santa Fe

Form 1179-A

## ASSOCIATION OF AMERICAN RAILROADS —BILLING REPAIR CARD. (Wheels and Axles)

WHEELS AND AXLES REMOVED					WHEELS AND AXLES APPLIED						
MAKER	Ry. Co.'s Initials on Wheel	WHEEL No. DATE CAST	Service Metal Before Turning	After Turning	CAUSE OF REMOVAL	MAKER	Ry. Co.'s Initials on Wheel	WHEEL No. DATE CAST	SERVICE METAL	New or Second Hand	Net Charge
3-28	none	7097	3/8		Turned / Damage	1-28-27	D	807 A	1/4	SA	
	none	31582	3/8			Ard		81504B			
✓	7C	260	3/8			✓	✓	811 A		SA	
	none	49069	3/8					81504B		SA	
AXLE A. A. R. Non-A. A. R. } Length _____ Condition of _____					AXLE A. A. R. Non-A. A. R. } Length _____						
LOCATION		Size and Kind of Wheels		JOURNAL		Wheel Seat		CENTER		LABOR	
RAIL 4		Removed 33" W W		Length Diameter		Diameter		Diameter		TOTAL	
		Applied 33" W W		REMOVED		APPLIED		5-3/8			
				9 5		6 1/2		5-7/16			
Date 5-23		1939		Repaired at Los Angeles		Inspector J. L. Weeks					
Car No. 80		Initial 7L		Kind 7L		Wheel Shop Inspector					





To Be Attached to Bill  
American Railway Association—Billing Repair Card

SANTA FE

Date May 23, 1939      Repaired at 612 Los Angeles,      Inspector R. V. Ketring,  
Car No. 88      Initial or Name Great American Circus      Kind Flat

End	Repairs Made			Labor Wrot.			Spring			Why Made
				Miscel.	Hrs.	Lbs.	Lumber	Steel	Cast	
							Ft.	Lbs.	Lbs.	
RL3&4	Two paid SH wrot steel wheels.....	16.64								Worn flanges
	Four journal bearings 9".....	4.08								" out
	Four dust guards.....	.32	.8							" "
	8 Journal box bolts and lock nuts.....	.32	47							" "
	Labor .....		7.9							Wheels etc.
AB	8 Journal boxes repacked.....	3.50								Worn out
L1&2	2 " Bearings .....	2.04								" "
A	2 Bro conn. cotter keys.....	.02								
	Air brakes cleaned.....	4.53								



ASSOCIATION OF AMERICAN RAILROADS --BILLING REPAIR CARD. (Wheels and Axles)

WHEELS AND AXLES REMOVED				WHEELS AND AXLES APPLIED							
MAKER	Ry. Co.'s Initials on Wheel	WHEEL No. DATE CAST	Service Metal Before Turning	CAUSE OF REMOVAL	MAKER	Ry. Co.'s Initials on Wheel	WHEEL No. DATE CAST	Full Flange Con-tour—Yes or No	SERVICE METAL	New or Second Hand	Net Charge
3-25	7C	121	57	Thin Rim	4-330	B	875		3/16	SA	
	700	31582	78	74 T	4-330		4317C				
	5C	68	✓		4-330	✓	967		✓	SA	
		81582			4-330		31626				
AXLE A. A. R. Non-A. A. R. } Length				AXLE A. A. R. Non-A. A. R. } Length							
LOCATION	Size and Kind of Wheels	Actual Dimensions	JOURNAL Length	Wheel Seat Diameter	CENTER Diameter	LABOR					
RY 11	Removed 33" WWS	9 5	9	6 1/2	5 7/16						
	Applied 33" R.S.	9 5	9	6 1/2	5 7/16	TOTAL					
Date 5-23-1939 Repaired at Los Angeles Inspector J. R.											
Car No. 88 Initial H. J. or Name H. J. Kind Wheel Shop Inspector											



# ASSOCIATION OF AMERICAN RAILROADS —BILLING REPAIR CARD. (Wheels and Axles)

WHEELS AND AXLES REMOVED					WHEELS AND AXLES APPLIED						
MAKER	Ry. Co.'s Initials on Wheel	WHEEL No. DATE CAST	Service Metal Before Turning	CAUSE OF REMOVAL	MAKER	Ry. Co.'s Initials on Wheel	WHEEL No. DATE CAST	Full Flange Con-tour—Yes or No	Service METAL	New or Second Hand	Net Charge
None	none	586114	5/16	Thrust Flange 74 T	8-25-27	8	911 7A		3 1/8	SH	
		none	9/16		24-1		A2346B				
		586393	9/16		5-23-53		889A		8 1/16	✓	
		none	9/16		24-1		283353				
AXLE A.A.R. Non-A.A.R. }		Length		Condition of		AXLE A.A.R. Non-A.A.R. }		Length			
LOCATION		Size and Kind of Wheels		JOURNAL		Wheel Seat		CENTER		LABOR	
PR 18		Removed 35" RPJ		Length		Diameter		Diameter		TOTAL	
		Applied 1		REMOVED		9 5"		5 7/16			
				APPLIED		9 5"		5 7/16			
Date 5/23		19 21 Repaired at		Inspector J. J. Walker		Wheel Shop					
Car No. 88		Initial or Name		Kind		Inspector					





To Be Attached to Bill  
American Railway Association—Billing Repair Card

SANTA FE

Date May 23, 1939      Repaired at 612 Los Angeles,      Inspector R. V. Ketring,  
Car No. 84      Initial or Name Great American Circus      Kind Flat

End	Repairs Made	Labor Wrot.			Spring			Why Made
		Miscel.	Hrs.	Lbs.	Ft.	Steel Lbs.	Mail. Lbs.	
	Air brakes cleaned.....	4.53						
B	One train line nipple 1 1/4x6".....	.14						Worn out
"	One SL angle cock.....	1.70						SL leaky core
"	One connection.....	.13						Repairs
"	One 'U' clamp R&R 4".....	.19						"
"	8 Journal boxes repacked.....	3.50						Worn out
R&L1-3	R-4 5 Journal bearings.....	5.10						Worn flange
R&L2	One pair SH wrot steel wheels.....	8.32						Worn out
	Two journal bearings.....	2.04						"
	Two dust guards.....	.16	.4					"
	Four box bolts and lock nuts 1-1/8x16.....	.16		23				"
	Labor.....	5.						Wheels etc.
BR	One side bearing bolt and lock nut 3/4x2.....	.20		1				Worn out



Hall 1 39 300 Bks. 9754

TO BE ATTACHED TO BILL

Santa Fe

Form 1179-A

## ASSOCIATION OF AMERICAN RAILROADS —BILLING REPAIR CARD. (Wheels and Axles)

WHEELS AND AXLES REMOVED					WHEELS AND AXLES APPLIED							
MAKER	Ry. Co.'s Initials on Wheel	WHEEL No. DATE CAST	Service Metal Before Turning	After Turning	CAUSE OF REMOVAL	MAKER	Ry. Co.'s Initials on Wheel	WHEEL No. DATE CAST	Full Flange Con-tour—Yes or No	SERVICE METAL	New or Second Hand	Net Charge
3-28 400C	7C	346- 49069	1/2"		Thin Flange 744	3-17-36 St-2	S	802 A E 407		3 1/16	SK	
3-28 400C	7C	85- 31582	1/2"			V	V	804 A E 407		✓	SK	
AXLE A. A. R. Non-A. A. R. } Length _____						AXLE A. A. R. Non-A. A. R. } Length _____						
LOCATION		Size and Kind of Wheels			JOURNAL		Wheel Seat		CENTER			
					Actual Dimensions		Diameter		Diameter		LABOR	
Rk. 2		Removed 33" RD			REMOVED		5		5		TOTAL	
		Applied 33" RD			APPLIED		5		5			
Date 5-23		1939			Repaired at		L. A. C. 2-2-39		Inspector		J. J. Wood	
Car No. 84		Initial			Applied		W. A. C. 2-2-39		Kind		Wheel Shop	
		or Name			Inspector		Kind		Inspector		Shop	





To Be Attached to Bill  
Association of American Railroads—Billing Repair Card

SANTA FE

Date May 23, 1939      Repaired at 612 Los Angeles,      Inspector R. V. Ketring,  
Car No. 82      Initial or Name Great American Circus      Kind Flat

End	Repairs Made	Labor Wrot. Lumber			Spring		Cast	Why Made
		Miscel.	Hrs.	Lbs.	Ft.	Lbs.		
	8 Journal boxes repacked.....							
	Air brakes cleaned.....							
L-4	One journal bearing 9".....							Worn out

To Be Attached to Bill  
Association of American Railroads—Billing Repair Card

SANTA FE

Date May 23, 1939      Repaired at 612 Los Angeles,      Inspector R. V. Ketring,  
Car No. 81      Initial or Name Great American Circus      Kind Flat

	8 Journal boxes repacked.....	3.50
	Air brakes cleaned.....	4.53
	L-1-2-3-4-R-1-2&4;	
	7 Journal bearings 9".....	7.14
		Worn out

To Be Attached to Bill  
American Railway Association—Billing Repair Card

SANTA FE

Date May 23, 1939      Repaired at 612 Los Angeles,      Inspector R. V. Ketring,  
Car No. 52      Initial or Name Great American Circus      Kind Pass. car

Ead	Repairs Made	Labor			Spring			Why Made
		Miscel.	Hrs.	Lbs.	Lumber	Steel	Mall.	
					Ft.	Lbs.	Lbs.	
A	3 Carrier iron bolts and lock nuts 3/4x4"		.9	3				Worn out
"	3 Do 3/4x5" .....		.9	3				" "
B	3 Do 3/4x4 .....		.9	3				" "
AB	12 Journal boxes repacked.....	5.25						
Bx3&12	2 Journal Bearings.....	2.04						
	Air brakes cleaned.....	8.63						" "

To Be Attached to Bill  
American Railway Association—Billing Repair Card

SANTA FE

Date May 23, 1939      Repaired at 612 Los Angeles,      Inspector R. V. Ketrings,  
Car No. 50      Initial or Name Great American Circus      Kind Pass. car

End	Repairs Made	Guards			Why Made
		Miscel.	Labor Wrot. Hrs. Lbs.	Steel Lbs. Mail. Lbs. Cast Lbs.	
Bx1&2	One pair SH wheels 36"RS.....				Worn flange
	material charge 2/16".....				
	service metal @ \$1.80.....	3.60			Worn out
	2 Journal bearings 9".....	2.04			" "
	2 Dust guards 9".....	.16			To restore
	Restore full flange.....		1.4		wheels to svc.
	Labor R&R wheels.....			10.40	
AB	12 Journal boxes repacked.....			5.25	
Bx3&9	2 Journal bearings 9".....			2.04	Worn out
Bx7	1 " Wedge (Drop forged) 15 Lbs.				Cracked
	@ 51½¢ .....			.83	
	Air brakes cleaned.....			8.87	



ASSOCIATION OF AMERICAN RAILROADS —BILLING REPAIR CARD. (Wheels and Axles)

WHEELS AND AXLES REMOVED					WHEELS AND AXLES APPLIED							
MAKER	Ry. Co.'s Initials on Wheel	WHEEL No. DATE CAST	Service Metal Before Turning	After Turning	CAUSE OF REMOVAL	MAKER	Ry. Co.'s Initials on Wheel	WHEEL No. DATE CAST	Full Flange Con- Tour—Yes or No	SERVICE METAL	New or Second Hand	Net Charge
523	Don	41 - 52237	9/16	3/16	Port Hinge # 74	6-13-30	\$	858	1/4	1/4	24	
423	Don	6882	9/16	3/16	Turned to Top of Ring	6-13-30	\$	894	1/4	1/4	24	
423	Don	53094	9/16	3/16	Ring	6-13-30	\$	29888	1/4	1/4	24	
AXLE A. A. R. Non-A. A. R. } Length	AXLE Non-A. A. R. } Length											
LOCATION	Size and Kind of Wheels	Actual Dimensions	JOURNAL Length	Wheel Seat Diameter	CENTER Diameter	LABOR						
Box 1-2	Removed 36120	REMOVED	9 7/16 4 1/16	6 1/16	5 1/16	TOTAL						
	Applied 36120	APPLIED	9 7/16 4 1/16	6 1/16	5 1/16							
Date 5-23-00		Repaired at		Inspector								
Car No. Augustus 50		Initial		Wheel Shop								
		or Name		Inspector								





To Be Attached to Bill  
American Railway Association—Billing Repair Card

SANTA FE

Date May 23, 1939      Repaired at 612 Los Angeles,      Inspector R. V. Ketring,  
Car No. 45      Initial or Name Great American Circus      Kind Pass. car

End	Repairs Made			Spring			Why Made
	Miscel.	Labor Hrs.	Wrot. Lbs.	Lumber Ft.	Steel Lbs.	Mall. Lbs.	
A	One wood end sill patch 4-1/2x5x27 1/2" .....			5			Decayed
"	Three att. bolts 1/2x7 1/2" .....			2			Worn
A	Actual .....	4.					Repairs
"	One vestibule diaphragm straightened on car cold. ....						Bent
"	20 Do stove bolts 1/4x1 1/2" .....		.08				
"	Actual .....		3.2				Dia. repairs
"	Three carrier iron bolts and lock nuts 3/4x3 1/2" .....		.9	3			Worn & loose
AB	12 Journal boxes repacked as per rule 66 5.25						
Bx4	One journal bearing 9" .....		1.02				Worn out
	Air brakes cleaned .....		8.00				

To Be Attached to Bill  
American Railway Association—Billing Repair Card

SANTA FE

Date May 23, 1939      Repaired at 612 Los Angeles,      Inspector R. V. Ketrang,  
Car No. 46      Initial or Name Great American Circus      Kind Pass. car

End	Repairs Made	Spring				Why Made
		Miscel.	Labor Wrot. Lumber	Steel	Cast	
		Hrs.	Lbs.	Ft.	Lbs.	Lbs.
A	One coupler shim.....		3			Raise coupler
	Two att. bolts $\frac{3}{4}$ x3 $\frac{1}{2}$ & L nuts.....	.6	2			
AR&L	Four side bearing shims 1/2"x3"x9" wood			1		Adj. clearance
Do	Eight side bearing bolts 3/4"x8".....	3.2	12			Loose and worn
B	Six carrier iron bolts and lock nuts.....	1.8	6			" "
AB	12 Journal boxes repaced as per rule 66. 5.25					
	Air brakes cleaned.....					8.17

To Be Attached to Bill  
Association of American Railroads—Billing Repair Card

SANTA FE

Date May 23, 1939      Repaired at 612 Los Angeles,      Inspector R. V. Ketrings,  
Car No. 83      Initial or Name Great American Circus      Kind Flat

End	Repairs Made	Labor Wrot. Lumber			Surf		Cast	Why Made
		Miscel.	Hrs. Lbs.	Ft. Lbs.	Steel	Mall. Lbs.		
8 Journals repacked.....								
Air brakes cleaned.....								
L-1-R3-R&L2								
4 Journal bearings.....								

Worn out





To Be Attached to Bill  
Association of American Railroads—Billing Repair Card

SANTA FE

Date May 23, 1939      Repaired at 612 Los Angeles      Inspector R. V. Ketring,  
Car No. 64      Initial or Name Great American Circus      Kind Stock

End	Repairs Made		Labor Wrot.		Lumber		Spring		Cast		Why Made
	Miscel.	Hrs.	Lbs.	Ft.	Lbs.	Ft.	Steel	Lbs.	Mall.	Lbs.	
Air brakes cleaned.....											
8 Journal boxes repacked.....											
One lon. running board 1"x7"x9'.....											Decayed

[Endorsed]: Filed Nov. 28, 1940.

(Testimony of R. V. Kettring.)

Mr. Schaefer: May it be stipulated that we paid \$55 for one round trip from Inglewood to Los Angeles, in transporting the cars?

Mr. Combs: So stipulated.

Mr. Schaefer: Cross examine.

The Court: Any cross?

Mr. Combs: Yes. [339]

### Cross Examination

Q. By Mr. Combs: The cars were moved from Baldwin Park to Inglewood in the condition in which they were at Baldwin Park, were they not?

A. Yes, sir. After several minor repairs were made to the cars, and on agreement with the parties in charge of the circus at that point that they would see that the air brakes were operative, we agreed to move them to Inglewood, so they could unload them, and move them from Inglewood back to our repair tracks for repairs.

Q. And that was done?

A. That was done. I was the one that agreed to that. [340]

TED DUCEY,

called as a witness in behalf of defendant, being first duly sworn, testified as follows:

Direct Examination

Q. Did you do any work for the Great American Circus in May of 1939?      A. I did.

Q. What work did you do?

A. I furnished trucks to move their wagons to the Rose Bowl.

Q. And where, with relation to your business, was the [341] railroad siding upon which the circus unloaded?

A. Right in front of my yard.

Q. Tell us about the hauling of the trucks, how you hauled them.

A. We hauled the wagons behind the trucks, tied them on and hauled them down to the Rose Bowl. Going out Lincoln Avenue, there is quite a hill going down into the Rose Bowl, and the main reason for the trucks, there was no brakes on the wagons or anything, and we had to tie the wagons, one in back of one truck, to start it, and one truck behind there, to hold it back, so they wouldn't run away. We lost two or three of them, as it was.

Q. Did you examine the circus wagons?

A. I saw them, yes.

Q. What did you find with respect to the brakes?

A. There wasn't any of them that were any good at all. There wasn't one wagon that had one that was worth even trying to use.

(Testimony of Ted Ducey.)

Q. And you put one truck on in front and one on behind?

A. Yes. We would take two wagons and tie it behind one truck, and then tie an extra truck on behind, to hold them back.

Q. Are you familiar with circus equipment?

A. Well, I have watched——

The Court: Answer yes or no.

A. Yes. [342]

Q. By Mr. Schaefer: Over what period of time?

A. 20 years or more.

Q. Have you seen circuses come there during that time?      A. Yes.

Q. Have you seen the equipment?

A. Yes, sir.

Q. Did you see the runs that were used in the Great American Circus?      A. Yes.

Q. Did you see the condition they were in?

A. I did.

Q. What condition were they in?

Mr. Combs: That is objected to on the ground that no foundation has been laid for his expert testimony.

Mr. Schaefer: I will go further, your Honor. I am just trying to conserve time.

Q. By Mr. Schaefer: Have you examined circus equipment?      A. I have.

Q. Have you had occasion to work for circuses?

A. I have.

Q. On numerous occasions?      A. I have.

(Testimony of Ted Ducey.)

Q. Over how many years?

A. Oh, 20 years.

Q. You have seen how many circuses unload there? [343]

A. One a year, I guess, I would say.

Q. Can you tell us what you observed as to the appearance of these runs?

Mr. Combs: That is objected to as incompetent, irrelevant and immaterial and still no qualification as an expert.

Mr. Schaefer: Your Honor, he can tell what he saw, of his own knowledge. He doesn't have to be an expert to testify to what it looks like or what it appears to be. Anyone can testify to that.

Q. By Mr. Schaefer: Are you familiar with runs used in unloading flat cars? A. I am.

Q. Have you observed runs used on circus flat cars over a period of years? A. I have.

Q. How many have you examined?

A. I have seen every one that unloaded for 20 years, one each year at least.

Q. Have you seen the wagons go up and down the runs? A. I have.

Q. The operation of the runs? A. Yes.

Q. Did you observe these runs? A. Yes.

Q. What condition did they appear to be in?

A. They were wood. They were not steel, like they [344] generally use on all the other circuses, and they had a crib up under them to brace the wood, and had quite a little trouble unloading.

(Testimony of Ted Ducey.)

Mr. Combs: May we have that last stricken out, "quite a little trouble unloading"?

The Court: That is a conclusion of the witness. Proceed.

Q. By Mr. Schaefer: What condition did the runs appear to be in?

The Court: What condition were they in?

A. They were not in very good condition.

The Court: Tell us about it.

A. They were made out of wood, and they had wooden cribbing underneath them, to let the cars off, and as they would let these wagons down over the wood runway, the vibration would drop the cribbing out from under it, and then they would have to stop and crib it all up again. [345]

Q. Did you examine the bolster block that broke?

A. Yes.

Q. Will you describe what a bolster block is?

A. A bolster block is on a wagon that is commonly [346] called, sometimes a fifth wheel, where the kingpin goes in. When they get worn they get a sharp edge, and if they get caught in a railroad track or twist or turn, you can't hardly get them back in line again.

Q. Did you examine these?

A. We had occasion to examine all of them, because we had trouble with them.

Q. Have you examined bolster blocks and wagons for a long time?



(Testimony of Ted Ducey.)

A. Ever since I was a kid.

Q. On how many wagons?

A. My father had at least 50 wagons, in the same business all his life.

Q. And you worked for him? A. Yes.

Q. What condition were these bolster blocks in? A. They were practically worn out.

Mr. Combs: That is a conclusion.

The Court: Yes. It will be stricken.

Q. By Mr. Schaefer: Were they worn or not worn? A. They were worn.

Q. Did you notice anything else about them that you now recall? A. About what?

Q. The bolster blocks, any other condition?

A. That was all it could be, was worn. [347]

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J. V. AUSTIN,

called as a witness in behalf of plaintiff, being first duly sworn, testified as follows:

The Clerk: State your name, please.

A. J. V. Austin.

Direct Examination

Q. By Mr. Combs: What is your occupation, Mr. Austin? A. Showman.

Q. How long have you been engaged in that business? A. About 40 years.

Q. And in that connection what shows have you been involved with, as such showman?

(Testimony of J. V. Austin.)

A. John Robinson's; Hagenback-Wallace; Al G. Barnes; Sells-Floto; Ringling Brothers; Barnum & Bailey; and the Great American Circus.

Q. What capacities did you work for those organizations in?

A. From advertising agent to manager.

Q. Practically every capacity of an executive nature? A. Most every one.

Q. And in that connection did you become very familiar with the operation and complete activities and functions of circuses? A. Necessarily.

Q. And your present residence is at San Antonio, Texas? [351] A. Yes, sir.

Q. Mr. Austin, did you have occasion to meet Marco Wolff, of Fanchon & Marco, involved in this law suit, at some time during 1939? A. I did.

Q. What was the nature and what were the circumstances of that meeting?

A. I was employed by them as traffic manager and advertising agent of the Great American Circus.

Q. When was that employment undertaken?

A. About the 8th or 9th of May.

Q. 1939? A. 1939.

Q. Who employed you?

A. Mr. Nelson sent me the wire that gave me the employment.

Q. What did you do then?

A. I came from San Antonio here.

Q. When did you arrive here?

A. I think it was about the 7th or 8th.

(Testimony of J. V. Austin.)

Q. What did you do upon your arrival?

A. I conferred with Mr. Nelson regarding the advertising matter that had been gotten up, and made some suggestions regarding additional advertising matter, and assisted in making the route in such a way that the moves could be made by train.

[352]

Q. How long did that activity engage your attention?

A. I would say about a week.

Q. Then about the 17th of May, or the 15th of May, did you continue your work for the Great American Circus?

A. I did.

Q. In what capacity?

A. As traffic manager and advertising agent.

Q. What did you do in that connection from then to the 23rd of May?

A. I consummated the railroad contract for the movement of the special train and directed the activities of the advertising agent, and divers and sundry other things connected with the advertising.

Q. You are familiar with the custom of renting railroad coaches to circuses, or in circuses, are you not?

A. Again, please.

Q. You are familiar with the custom or the manner in which railroad coaches, Pullman coaches, or those coaches in which the performers sleep, are rented to circus companies, are you?

A. You mean rented by circus companies from other owners?

Q. Yes.

A. Yes.

(Testimony of J. V. Austin.)

Q. Are they rented with or without pillows, sheets and blankets? [353]

A. When rented from the Pullman Company, which it sometimes becomes necessary to do, they naturally come equipped, with their man in charge, and, I would say, when being rented for other purposes, without.

Q. That is to say, in all other cases, where such cars are rented, other than when they are rented from the Pullman Company, they come without that equipment? A. I would say so, yes.

Q. Did you have occasion to examine the railroad cars in this Great American Circus?

A. I did not.

Q. You did not? A. I did not.

Q. Did you go out to Baldwin Park before the opening day of the circus? A. I did.

Q. Did you examine any of the equipment out there at that time?

Mr. Schaefer: Just a minute. I object to that unless it is the equipment used by the Great American Circus.

The Court: It should be limited.

Mr. Combs: It should be. I so qualify my question.

A. Only to the extent that the various wagons that were to be used were identified by Mr. Clawson as "this" and "that" and "this," and so forth.

Q. By Mr. Combs: Can you state what your observation [354] of their condition was at that time?

(Testimony of J. V. Austin.)

A. My observations of their conditions were that they were usable.

Q. Were they in good condition, suitable for use for the production of a circus?

Mr. Shaefer: I object to that as calling for the conclusion of the witness, without proper foundation being laid.

The Court: Let us find out what he knows about it. Do you know anything more about them?

A. I can only say that they looked to me to be usable.

Q. By Mr. Combs: You made only the one visit in Baldwin Park before the 23rd? A. Yes.

Q. And on the 23rd what did you do in connection with the Great American Circus?

A. I devoted most of my time to the advance activities, in getting the advertising out and directing the men in charge of it.

Q. Were you present at Inglewood when the show was put on?

A. I was there at the night performance.

Q. Did that go off in order and in a normal manner?

A. I thought for the initial day it went off unusually good.

Q. Were you at San Diego when the show went off there? [355] A. I was not.

Q. Were you at Santa Ana when it went off there? A. I was not.

Q. At Pomona? A. No, sir.



(Testimony of J. V. Austin.)

Q. Were you at Pasadena? A. No, sir.

Q. Then the only show or performance that you saw was that at Inglewood? A. Yes, sir.

Q. Did you have occasion at any time during the course of the operation of the Great American Circus to examine the equipment?

A. I did not.

Q. In connection with the production of circuses, has it been your observation that circuses have one or more hot boxes in a run of even a week?

Mr. Schaefer: I object to that as leading and suggestive.

The Court: It is leading. Sustained.

Q. By Mr. Combs: Has it ever been your experience to observe a hot box on one of the wagons in a circus? A. Yes.

Q. Frequently or infrequently?

A. Frequently, especially since they move them by automobile. [356]

Q. In your experience with circuses, how long does it ordinarily take to get smooth running operation after the circus has first started running?

A. I would say about a week.

Q. Was there any difference in the manner in which this Great American Circus, so far as you observed it, observed the task of getting under way as a smoothly operating circus, from any other circus?

Mr. Schaefer: I object on the ground that no foundation has been laid, and the witness was not



(Testimony of J. V. Austin.)

present, and didn't have the opportunity to see the functioning of this circus.

The Court: He doesn't seem to have shown, at any rate, that he knows anything about it in these other places.

Q. By Mr. Coombs: Respecting the billing of a circus, how long is it ordinarily the case that billing is done, how long in advance of the presence of the circus in a given town?

A. Usually two weeks.

Q. Was that done in the case of the Great American Circus? A. It was not.

Q. How long was the advance notice of billing in that circus? A. Seven days.

Q. Was that an inadequate length of time for the best results in billing? [357]

A. According to the regular way of doing it, yes.

Q. During your experience in a circus have you ever seen train flat decks or runs repaired in the ordinary run of a circus?

A. You refer to the decking on the flat cars?

Q. Yes. A. It frequently wears out.

Q. And has to be replaced?

A. And has to be replaced from time to time—from the spikes in the chock.

Q. Is such also the case with tent rigging, blocks, falls and chairs? A. Yes.

Q. And also with wagons, in fact; isn't that correct?

(Testimony of J. V. Austin.)

A. They continually may get out of order. They have very strenuous work, riding on the flat cars at night and being hauled over all kinds of roads in the daytime.

Q. Would you say, from your experience with a circus, that repairs becoming necessary to such equipment during the course of a circus are an ordinary or an extraordinary thing?

A. Any circus requires daily repairs.

Q. A blacksmith goes right along with it?

A. A corps of blacksmiths.

Q. And is constantly in attendance, fixing up miscellaneous circus equipment? [358]

A. Yes.

Q. Including blocks, falls, wagon runs and flat decks, and everything? A. Yes.

Q. Is that right? A. Yes.

Mr. Combs: That is all.

The Court: Cross examine.

#### Cross Examination

Q. By Mr. Schaefer: Mr. Austin, you say repairs are frequently necessary? A. Daily.

Q. Is that caused by the use of the equipment?

A. Yes, by the very strenuous treatment it receives.

Q. After equipment has been brought into winter quarters after a season, is it customary to make any repairs then?

A. Not until before they start out in the spring.

Q. About how long would it take to get their equipment in shape?

(Testimony of J. V. Austin.)

A. That would depend upon the force.

Q. Tell me about the force. Give me the number. Give me some idea as to how long it would take.

A. That would depend upon the nature and the amount of the repairs, and the kind and number of mechanics that [359] you have to make them with, and the materials, and the accessibility of the special material which is necessary.

Q. Suppose, Mr. Austin, that you have circus equipment out for a season—I suppose that would be from spring until about September?

A. Until about November.

Q. Suppose you had circus equipment out for a season, in ordinary use, such as it gets, and which you are familiar with, how long would you say it would take to put that equipment into repair before it could go out the next season, and tell me upon what you base it, number of men, etc.

A. I wouldn't hazard a guess until I had seen the equipment and know what repairs are necessary.

Q. Will you tell me how long it would have taken to put the Hagenback-Wallace equipment that you saw out there into shape, supposing it to have come in in September, and to have had no work done to it?

A. I wouldn't know what kind of shape it was brought in in.

Q. In good condition, so that it would be thoroughly repaired, and so that it would be usable and——

Mr. Combs: We object to that. It is a little bit involved there.

(Testimony of J. V. Austin.)

Mr. Schaefer: Wait until I finish my question.

Q. (Continuing) So that it was in good condition and [360] ready for use.

Mr. Combs: I don't understand what the question is. May we have the question again?

Mr. Schaefer: Will you read the question, Mr. Reporter?

(Question read by the reporter.)

Q. By Mr. Schaefer: And in good condition and ready for use.

A. I couldn't hazard a guess, unless I was more familiar with the minute condition of the property than I was.

Q. You weren't familiar with the minute condition of this property, then? A. No, sir.

Q. Are you familiar with any instance in which Hagenback-Wallace rented out their sleeping cars?

A. Not Hagenback-Wallace.

Q. Are you familiar with any other circus company renting out its cars? A. Yes.

Q. What company? [361]

A. I would have to make a little explanation in connection with that.

Q. Can you tell me what company, first?

A. With the American Circus Corporation. We operated several shows, and we rented, I think, some cars from each one of the shows to a carnival put out during the summer.

Q. How many such contracts are you familiar with, how many times?

(Testimony of J. V. Austin.)

A. I think we only did it twice.

Q. And that is what you base your knowledge of the custom on?      A. Yes, sir.

Q. When you say the equipment looked usable, you made just this one-minute inspection you spoke about?      A. Non-minute. [362]

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JACK W. KRAMER,

called as a witness on behalf of defendant, being first duly sworn, testified as follows:

The Court: Your name?

A. Jack W. Kramer.

Direct Examination

Q. By Mr. Schaefer: What is your business or occupation at the present time?

A. At the present time I am working as a labor conciliator of the American Federation of Labor.

Q. In the latter part of May of 1939 what was your business or occupation?

A. I was the representative of the American Federation of Actors in the circus division, from Canada to Mexico, for the American Federation of Actors.

Q. Are you familiar with the Great American Circus that was produced in May of 1939?

A. Very much so.

Q. Did you see that circus out at Inglewood?

A. Yes, sir.



(Testimony of Jack W. Kramer.)

Q. Did you have a conversation with Mr. Marco Wolff in connection with that circus?

A. Out there, you mean?

Q. At any time. A. Yes, sir. [364]

Q. Where?

A. In his office, when I contacted him to take out a closed contract for the circus.

Q. And did you see him on any other occasion?

A. Yes, sir; I saw him on the grounds.

Q. Where? A. Out at Inglewood.

Q. Did you have a conversation with him there?

A. Yes, sir.

Q. Who was present on that occasion?

A. Well, I can't recall the names, it has been so long ago, but I believe there was a man, the manager of the circus.

Q. Mr. Clawson? A. Clawson is the name.

Q. Will you relate that conversation?

A. I told him about wanting a closed contract for the men, that most of our men were already in it. He said at the present time that he had been so involved in fixing the circus over, so that it would be possible to present a show under the canvas, that he wanted to know if I would give him a little extension of time, until such time as they could know whether or not they could afford to pay the price that we wanted for the men, and whether or not they could see their way clear that they could organize and unionize the circus. So I told him that in the event [365] that he did not organize immediately in



(Testimony of Jack W. Kramer.)

that town, or not later than the next town, it would be an utter impossibility for him to go into San Francisco with the show, because he wouldn't have a chance to even open there, much less show in the town, that they would not be as lenient with him as I was.

Q. Have you had any experience with circuses?

A. I have had about 27 years of it, yes, sir.

Q. Have you been a performer? A. Yes, sir.

Q. Did you see this circus equipment?

A. I did.

Q. Will you state what you saw?

Mr. Combs: That is objected to.

Mr. Schaefer: Well, he has had 27 years of experience with circuses.

Mr. Combs: That is not a proper foundation for an opinion yet. He can say what he saw.

The Court: He can state what he saw.

Mr. Schaefer: Go ahead.

A. I saw the big top in the process of going up, and I saw the men putting up the side walls and guying the ropes, and I saw the juice wagon and the ticket wagon; I saw the animal wagons; I saw the dressing room tents, where the horses and performers were, and I had occasion to go down on the tracks and see these so-called sleepers they [366] had there, that I forbade my people on the show to sleep in them.

Mr. Combs: Oh——

The Court: That will be stricken. Just answer the questions.

(Testimony of Jack W. Kramer.)

Q. By Mr. Schaefer: Will you describe the sleeping cars there that you saw?

A. Well, there was nothing in there other than being very, very dirty, and they had a box down on one end of the platform, where I had to step on it to get onto the first step. Then when we went in it seemed like there was straw in the ticking; instead of being a mattress, it was a straw ticking for them to lay on, and I didn't see anything else, or there was no covers or anything else. I suppose there was—— [367]

Q. By Mr. Schaefer: At Inglewood, did you say?

A. No. It was over at Pomona.

Mr. Schaefer: He said the opening day.

Mr. Combs: He is talking about Pomona now.

The Witness: You asked me if I had been any other place other than the opening day, and I believe Pomona was the town the circus closed in.

Mr. Schaefer: It has been stipulated that that is the place.

The Witness: Yes.

Q. By Mr. Schaefer: Did you have a conversation with anyone there?

A. Yes.

Q. Was Mr. Clawson present?

A. No, sir. Mr. Clawson was on the inside with this other gentleman you mentioned before, Marco.

Q. At the time you closed the circus did you have a conversation with Mr. Clawson, or was he present?

(Testimony of Jack W. Kramer.)

A. Mr. Clawson was present, and then he kept on leaving and coming back, and coming back and leaving, to oversee some of the other things going on on the inside. They were kind of late for the show, and he kept on going back and forth.

Q. Did you state at that time why the circus was being [369] closed?      A. Yes, sir.

Q. To Mr. Clawson?

A. To Mr. Clawson and to Mr. Marco as well. Mr. Marco kept referring me to Mr. Clawson, because he said he was not familiar with circuses.

Q. What did you say to Mr. Clawson in that regard?

A. I told him we would have to close the circus or be sure the men were all organized.

Q. Did you give him any other reason than that?

A. Yes, we would have to close it. I told him there would have to be several repairs made before I would allow my performers to perform in the show.

Q. I take it this was a conversation with Mr. Clawson?

Mr. Combs: It is self-serving.

The Court: Proceed.

Q. By Mr. Schaefer: Go on with the conversation where you left off, Mr. Kramer, and what you said in regard to closing to Mr. Clawson. You stated that several repairs had to be made. Did you mention them?

A. Yes.

Q. What did you say?

(Testimony of Jack W. Kramer.)

A. I told him I wouldn't allow anything to be attached to one pole that was on the end of the big top down around the entrance, that seemed to be so cracked—in fact it was cracked—and they had two bands of iron, one at the [370] top of the place where it had been split, and it split all the way through, and a band of iron on the bottom of it.

Q. Was this the main pole?

A. One of the quarter poles. [371]

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CHARLES E. CUNNINGHAM,

called as a witness in behalf of defendant, being first duly sworn, testified as follows:

Direct Examination [376]

Q. Did you work in this capacity for the Great American Circus?      A. Yes, sir.

Q. Did you have an opportunity to notice the condition of the seats?      A. I did.

Q. Where did you join the circus—in Inglewood?      A. Yes, sir.

Q. Did you follow through to Pomona?

A. Yes, sir.

Q. Did you help erect seats in each one of the places?      A. Yes, sir.

Q. Will you tell us the condition of the seats as you saw them?

A. Well, the condition of the seats was such that it would retard the erection of the seats in the

(Testimony of Charles E. Cunningham.)

proper length of time that was necessary to erect them.

Mr. Combs: I ask that all of that be stricken.

The Court: Yes, I will strike it.

Q. By Mr. Schaefer: Tell us the condition of the seats. What was the matter with them, etc.?

A. Well, the jacks were misfits, that is, the opening [377] in the jacks was of various widths.

Q. What is a jack?

A. A jack is what holds up the stringers that you put the bible backs on, and then you set your chairs on top of the bible backs.

Q. What was the matter with them?

A. They were misfits. There were various widths in the openings, and in order to erect the stringers on the jacks you would have to choose various and sundry jacks to make them fit on one stringer, and some of the jacks were in such shape that you had to use them in such a manner that they would be strong enough to be used.

Q. Did this cause any delay?

A. Yes, it delayed the erection of the seats.

Q. Did you examine the cross members?

A. The cross members—you mean the bible backs?

Q. Yes.

A. Yes. They were frayed on the ends, frayed by continuous use over a duration of time, and they become worn and frayed. And may I say what is the natural action in starting and shipping out in the spring?



(Testimony of Charles E. Cunningham.)

Q. If you know the custom.

A. To see that all those frayed ends are taken care of and all worn planks are replaced, so that they are in good shape, good condition.

Q. Was that done in the case of the equipment used by [378] the Great American Circus?

A. No, sir, it showed no signs of being put in usable condition.

Q. Did you see the decks of the flat cars?

A. I did.

Q. What condition were they in?

A. They were in aged condition. I didn't examine them closely enough to see if they had any holes in the decks, but they were in aged condition, and just like any aged material, it is apt to give way.

Mr. Combs: That part is a conclusion.

Q. By Mr. Schaefer: You didn't examine them for holes?

A. No. I observed the wagons coming off the flats, and their action gave me the conclusion that there were holes in the flats, or weak spots.

Mr. Schaefer: Cross examine.

#### Cross Examination

Q. By Mr. Combs: These seats were inspected by the seat inspector at Pasadena, weren't they?

A. Yes, sir, he was there.

Q. And passed, too?

A. After we had tried our best to put them in the proper condition, yes.



(Testimony of Charles E. Cunningham.)

Q. But they passed inspection?

A. Yes, but after a certain length of time. [379]

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CHARLES H. PRIEST, JR.,

called as a witness in behalf of defendant, being first duly sworn, testified as follows:

Direct Examination [398]

Q. Did you observe the equipment out there in May of 1939?      A. Yes, sir.

Q. What did you observe, first, with respect to the wagons?      A. In what respect?

Q. Well, the wheels.

A. They were all in very poor condition.

The Court: Just tell us what you found, not your conclusion.

Q. By Mr. Schaefer: In other words, why did you come to any conclusion? We don't want the conclusion, but we want to know the things that you saw, that you observed.

A. Well, the wheels on the wagons were in very bad shape.

The Court: That doesn't mean anything. I can't give [399] consideration to that.

Q. By Mr. Schaefer: In what way, Mr. Priest?

A. The whole point, of course, is that it would be very hard for me to answer that question, because primarily I was interested in selling the merchandise.

(Testimony of Charles H. Priest, Jr.)

The Court: I am not concerned about that.

Q. By Mr. Schaefer: Did you make any observation of the axles? Could you determine from looking at the wagons anything about the axles? Did you observe the way the wheels slanted?

The Court: Let him state just what he saw.

A. Well, I could see that the wheels did slant out at the bottom, where they should have slanted in. The set was out on a number of the wheels. And the wheels themselves were in poor condition.

Mr. Combs: That is objected to again.

Mr. Schaefer: I submit, your Honor, he is telling what he saw.

The Court: But I don't know what "poor" means, or what it means to him.

A. The wheel itself should be in perfect condition, the spokes should be tight, and the fellies should be tight.

The Court: Tell us what you saw. Were the spokes loose?

A. I couldn't say, but the tires were loose on the fellies. [400]

The Court: You say they were?

A. Yes, sir. [401]

Q. By Mr. Schaefer: Were you present when the equipment was loaded on the cars?

A. No, sir.

Q. You were not? A. No, sir.

Q. Did you send out any articles to Baldwin Park? A. Yes, sir.

(Testimony of Charles H. Priest, Jr.)

Q. For repairs? A. Yes, sir.

Q. Do you have a copy of any invoices or anything which would indicate what you sent out?

A. Yes, sir.

Q. Can you refresh your recollection from them?

[402]

A. I would have to get them out of my brief case. I brought them up for that purpose.

The Court: Get your brief case. I thought those items were admitted.

Mr. Combs: We will admit any items that——

Mr. Schaefer: They haven't been.

Mr. Combs: I think we actually paid for most of them. It was over a thousand dollars.

Mr. Schaefer: I don't think so.

The Witness: Do you want me to enumerate——

The Court: Just pick out the bills and show them to counsel, and they can be marked as an exhibit.

A. These are the original sales sheets of our records, which, as a record, must be returned to our files, for our files there, after the case is over. That wants to be stipulated, your Honor.

The Court: Well, that is up to you.

The Witness: We have to have these records back for our files.

Mr. Combs: The court might have to have them.

The Court: If the court gets its mark on them, we won't give them back.

The Witness: I can give you copies of them, but I can't give you the originals. We have to have them in our files.

(Testimony of Charles H. Priest, Jr.)

Mr. Combs: Did Fanchon & Marco pay all of these bills, [403] or is this some of the bills we paid?

Mr. Schaefer: I don't know until he reads them. I have some that we paid.

The Court: They are all included in this statement?

Mr. Combs: I will take counsel's word for those they paid.

Mr. Schaefer: All right. They are all included in the statement, and they have all been paid for.

The Court: He says that he will concede that you furnished and paid for them, so you can take your bills back.

The Witness: O. K., sir.

Q. By Mr. Schaefer: Did you see the circus at San Diego?

A. No, sir.

Q. Did you see it at Santa Ana? A. Yes, sir.

Q. Did you see the equipment leave the train?

A. Yes, sir.

Q. Did you see any of the wagons on the road?

A. Yes, sir.

Q. Did you notice anything particular about any of the wagons, or wagon? Did you notice any wheels——

Mr. Combs: That is leading and suggestive, I think.

The Court: Answer.

A. Not while they were being unloaded off the train. [404]

Q. By Mr. Schaefer: On the street?

(Testimony of Charles H. Priest, Jr.)

A. On the street, yes, sir.

Q. What did you see?

A. One wagon that they were pulling down Main Street in Santa Ana, the wheel was in such condition that——

The Court: Just what condition was it in?

A. The bushing was smoking, apparently worn out.

The Court: Not apparently.

Q. By Mr. Schaefer: Did it appear to be worn? Or couldn't you tell by looking? Did you examine the wheel?

A. They took the wheel off after they got down to the lot, and the bushing was all broken.

Q. Did you see it then?           A. Yes, I did.

Q. Were you alone when you saw this wheel smoking, or was someone with you?

A. No. Mr. Daillard was with me.

Q. Did you observe the wagon later?

A. Yes, sir.

Q. When?

A. At the shop on the show lot in Santa Ana.

[405]

Q. Did you supply any rope—did Mr. Daillard order any rope from you on that occasion, at Pasadena?

A. He ordered some. Ordinary rope, you mean, for the top?

Q. Yes.

A. There were a number of coils, I think, furnished in Pasadena, if I recollect right.



(Testimony of Charles H. Priest, Jr.)

Q. Was this equipment furnished at one time or at one place, or during different times?

A. Oh, no; different times.

Q. At each stop? A. That is right.

Q. Did you send equipment to San Diego?

A. No, sir.

Q. But to Santa Ana? A. Yes, sir. [406]

Q. Pasadena? A. Yes, sir.

Q. Some to Pomona? A. Yes, sir.

Q. Did you send some out to Inglewood?

A. Yes, sir.

Q. By Mr. Schaefer: Do you handle rope?

A. Yes, sir.

Q. How long have you handled rope?

A. Possibly 20 years.

Q. Have you had occasion to examine rope during that time? A. Yes, sir.

Q. Did you examine the rope in this circus?

A. I had occasion to examine, check pieces of rope on the circus.

The Court: When? [407]

A. At Pasadena.

Q. By Mr. Schaefer: What was the condition of the rope?

A. It was dry-rotted.

Q. Dry-rotted? A. Yes.

Q. Did you state that to anyone?

A. Yes, sir.

Q. To whom?

A. Mr. Daillard and Mr. Eagles.



(Testimony of Charles H. Priest, Jr.)

Q. Did you tell it to Mr. Clawson?

A. Yes, sir.

Mr. Schaefer: You may cross examine. [408]

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WALTER S. GUICE,

a witness of lawful age, being produced, sworn and examined on the part of the defendant, on his oath deposeeth and saith:

Direct Examination

By Mr. Arthur: [417]

Q. Can you tell us what the main falls are?

A. The main falls holds the big top and the riggings.

Q. What is a fall? A. Pulley block and rope.

Q. That holds the main circus tent?

A. That is right, and the canvas and the rigging; there is four of them. They had a four-pulley top, one at each pole.

Q. Is that the rope upon which all the riggings of the various acts and equipment are supported?

A. Yes, sir, where all the big riggings is hung, and then they have a ring that they hang on the quarter pole.

Q. And your rigging was supposed to be hung onto what? A. From the pole ring of the big top.

Q. Why did you refuse to go up that night?

A. The main fall on the center pole on which our rigging was hung was bad and I wouldn't take no chances on it.

(Deposition of Walter S. Guice.)

Q. What was wrong with it? [422]

A. The ropes showed dry rot.

Q. That is, the rope? A. Yes, sir.

Q. What was the condition of the rope?

A. It was frayed out and didn't look safe.

Q. And you and the members of your act refused to go up because of the condition of the rope?

A. That is right. We called for the manager of the show and asked him about a chain to lash the bale ring of the big top to the center pole so if the rope would break it wouldn't come down, which he did.

Q. The rope of which you speak, if that rope were, as you say in bad condition, that was the main supporting rope of the tent itself, wasn't it?

A. Of that one piece, yes, sir.

Q. On the center pole? A. Yes, sir. [423]

#### Cross Examination

Q. Had you noticed the condition of the main falls before that time?

A. No, sir, until I seen them break putting up, and then I went up and examined them when they had my rigging up. I seen them break when I put the rigging up and I examined them.

Q. What condition did you find them in when you examined them?

A. Dry rot, indicating they had been laying around and not used.

Q. Can you explain a little more fully what you mean by dry rot?

(Deposition of Walter S. Guice.)

A. This rot exists after it is in a real dry place. It is manila rope, and they generally put a little tar in it and it dries out, just like you put grease in the cable, and it lays there and dries out, and dust gets in there and cuts the fiber and it eventually gets dry, and when it gets [432] dry it is just like powder; it falls apart. Manila rope is oiled; it has some kind of oil in it, and if you aren't using it it dries out and causes dry rot. Dust gets in it and cuts it, and they break up from being pulled over iron sticks or iron edges, and that cuts the fibers, and it finally weakens. [433]

#### Recross Examination

A. Since you asked me I will tell you: The ridge ropes were bad. Of course, that doesn't have anything to do with the canvas; that is only to raise the poles with, and after you get it raised the ridge rope would be slacked off; that is on a pulley, see? That is the condition I saw in Pasadena; that is the condition it was in.

Mr. Combs: I move that the last part of that answer "That is what the condition was in Pasadena" be stricken from the record. That is not responsive to any question, and is a statement of a conclusion on the part of the witness. [434]

## DEFENDANT'S EXHIBIT No. 1

## AGREEMENT

This Agreement, made and entered into this 11th day of May, 1939, between Fanchon & Marco, Inc., hereinafter referred to as First Party, and Glendale Post #127, Ltd., hereinafter referred to as Second Party,

Witnesseth:

Whereas, the parties hereto desire to enter into an agreement whereby First Party shall arrange, stage, produce, furnish and deliver a three-ring circus, under canvas, for presentation in the City of Glendale, Calif., on the dates of June 1st, 1939, with afternoon and evening performances, on a location designated as San Fernando Road and Allen Ave., and hereinafter referred to as "the location"; and

Whereas, Second Party agrees to sponsor said circus under its auspices.

Now, Therefore, in consideration of the promises herein contained, the money to be paid First Party by Second Party, and the services to be rendered by the First Party, it is mutually understood and agreed as follows, to wit:

First Party Agrees At Its Own Expense As Follows:

1. To transport, deliver and erect at "the location" all and complete equipment necessary to present a three-ring circus under canvas, and a complete sideshow, and to take away said equipment on

completion and leave "the location" in a clean condition;

2. To stage and produce a three-ring circus lasting a minimum of two hours and consisting of approximately twenty-six (26) displays of circus entertainment, and including a brass band to play for the entire performance, afternoon and evening.

3. To supply an adequate amount of circus posters and to post the same in suitable locations; to supply copies and mats for newspaper ads and press material;

4. To direct the publicity;

5. To supply all necessary administrative services including an auditor, advance agent, press agent, business manager and ticket sellers.

6. To supply the general admission tickets;

7. To furnish two toilets (one for men and one for women).

8. To pay all salaries for the artists and acts, labor, transportation, cartage and administrative expenses, including all taxes, levies or assessments, levied under so-called Social Security Acts or Unemployment Insurance Laws, and First Party agrees to hold Second Party harmless from any claims and demands by any competent authority for all or any part of such levies or assessments.

9. To pay all federal taxes upon admissions;

10. To carry all necessary Workmen's Compensation Insurance.

Second Party Agrees At Its Own Expense As Follows:



1. To supply a suitable location and to procure the license to conduct said Circus;

2. To produce the advance tickets and to conduct and carry on an advance ticket sale at least two weeks prior to the date of the first performance.

3. To furnish any additional toilets required by law over and above the two furnished by First Party.

4. To furnish adequate police and fire protection;

5. To furnish active working committees requested by First Party.

Both Parties Hereto Agree to the Following:

1. The Gross receipts from the sale of all advance exchange tickets, all gate admissions, including the side show, after deduction of federal taxes shall be divided seventy percent to the First Party (70%) and thirty percent (30%) to the Second Party.

2. Second Party agrees to pay to First Party all monies received from said advance ticket sale up to the sum of \$1,500.00 and said \$1,500.00 is then to become such a sum portion of the First Party's seventy percent (70%) share of the gross receipts referred to in the preceding paragraph.

If, by the sale of advance tickets, this sum to be given by Second Party to First Party does not reach the sum of \$1,500.00, then first Party is to take out of the general admissions a sum equal to the difference between the total sum received for the sale of advance tickets and \$1,500.00 and in such

event, said \$1,500.00 shall be such a sum portion of the First Party's Seventy Percent (70%) share of the gross receipts referred to in the preceding paragraph in this agreement.

3. First Party will furnish without cost to Second Party an advance ticket man who will assist Second Party in its ticket campaign and will aid and act as advisor to Second Party.

4. No concessions shall be maintained on the location except those operating under the license or consent of the Second Party, and all revenue from the sale and operations of such concessions shall be exclusively retained by the Second Party. Unless otherwise agreed to, the only concessions to operate on the location shall be as follows:

Hot Dogs	Balloons
Hamburgers	Canes
Lemonade	Whips
Soft Drinks	Hats & Novelties
Coca Cola	Souvenirs
Popcorn	Frozen Custard
Candy	Tintypes
Crackerjack	Guess Your Weight
Ice Cream Bars &	Scale
Cones	Candy Floss
Peanuts	Parking

5. While it has been agreed that First Party shall direct the publicity, it is understood that in most instances the best publicity can be obtained on the application of the Second Party owing to its

local position with the press, etc., and the Second Party agrees to fully cooperate with the First Party in obtaining the best publicity and First Party agrees to defray seventy percent (70%) of the cost of local newspaper advertising and Second Party agrees to pay thirty percent (30%) of the cost of such local newspaper advertising.

6. First Party agrees to carry policy of Public Liability Insurance, insuring parties hereto against any claims for injuries to persons or property. Second Party also agrees to carry policy of Public Liability Insurance, insuring parties hereto against any claims for injuries to persons or property.

7. It is understood and agreed that circumstances beyond the control of the First Party, such as fire, flood, transportation delay, strikes, war or what is defined in law as "Act of God", shall be an excuse for non-performance hereunder by either of the parties hereto, and in such event neither of the parties hereto shall be liable to the other for such non-performance.

8. This agreement shall be binding upon the heirs, administrators, assigns and successors of the parties hereto.

FANCHON & MARCO, INC.

By.....

GLENDAL POST #127 AMN.  
LEGION

By ARNOLD R. SEIFERTS,

Commander.

[Endorsed]: Filed Nov. 22, 1940.

DEFENDANT'S EXHIBIT No. 2

Agreement dated May 4, 1939, between Fanchon & Marco, Inc. and Long Beach Pyramid No. 43, A. E. O. S. Filed in the District Court November 22, 1940.

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DEFENDANT'S EXHIBIT No. 3

Agreement dated May 27, 1939, between Fanchon and Marco, Inc. and Napa Post 113, American Legion. Filed in the District Court November 22, 1940.

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DEFENDANT'S EXHIBIT No. 4

Agreement dated May 29, 1939, between Fanchon & Marco, Inc. and American Legion Post #13. Filed in the District Court November 22, 1940.

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DEFENDANT'S EXHIBIT No. 5

Agreement dated May 19, 1939, between Fanchon & Marco, Inc. and Charles Roe Post #30 of the American Legion. Filed in the District Court November 22, 1940.

## DEFENDANT'S EXHIBIT No. 6

Agreement dated May 29, 1939, between Fanchon and Marco, Inc. and Oakland American Legion Committee. Filed in the District Court November 22, 1940.

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## DEFENDANT'S EXHIBIT No. 7

Agreement dated May....., 1939, between Fanchon & Marco, Inc. and Santa Ana Lodge #794 B. P. O. E. Filed in the District Court November 22, 1940.

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## DEFENDANT'S EXHIBIT No. 8

Agreement dated May 29, 1939, between Fanchon & Marco, Inc. and William J. Quinn. Filed in the District Court November 22, 1940.

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## DEFENDANT'S EXHIBIT No. 9

Agreement dated May 16, 1939, between Fanchon and Marco, Inc. and Santa Monica Cities Post 123, American Legion. Filed in the District Court November 22, 1940.

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## DEFENDANT'S EXHIBIT No. 10

Agreement dated May 18, 1939, between Fanchon & Marco, Inc. and Ventura Lodge #1430



B. P. O. E. Elks. Filed in the District Court  
November 22, 1940.

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DEFENDANT'S EXHIBIT No. 11

Agreement dated May 6, 1939, between Fanchon & Marco, Inc. and D. M. Price. Filed in the District Court November 22, 1940.

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DEFENDANT'S EXHIBIT No. 12

Agreement dated May 6, 1939, between Fanchon & Marco, Inc. and Inglewood Council of Parents and Teachers. Filed in the District Court November 22, 1940.

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DEFENDANT'S EXHIBIT No. 13

Agreement dated May 2, 1939, between Fanchon & Marco, Inc. and Bakersfield, California Lodge No. 266 B. P. O. Elks. Filed in the District Court November 22, 1940.

## DEFENDANT'S EXHIBIT No. 14

The following telegram was sent to:

- Mr. Everett M. Glenn, 709 Capital Bank Bldg.,  
Sacramento, Calif.
- Mr. Bert Ronzee, Commander, American Legion,  
1762 Elm St., Napa, California.
- Mr. Ray L. Johnson, Sacramento Memorial  
Mausoleum, Stockton Blvd., at El Paraiso,  
Sacramento, Calif.
- Mr. Fred S. Dean, 400 American Avenue, Long  
Beach, Calif.
- Mr. Freed Hair, Pyramid #43, Sciots, Long  
Beach, California.
- Mr. Arnold R. Seifert, Commander Post 127,  
American Legion, Glendale, Calif.
- Mr. W. F. May, Post #123, American Legion,  
Santa Monica, Calif.
- Mr. W. F. May, 12216 Dorothy St., Brentwood  
Heights.
- Mr. Don Price, Ryans Auditorium, Fresno,  
California.
- Mr. John R. Huff, B. P. O. Elks, Bakersfield,  
Calif.
- Mr. Russell T. Petis, B. P. O. Elks, Bakers-  
field, Calif.
- Mr. W. E. McNeil, Ventura Lodge 430, B. P. O.  
Elks, Ventura, Calif.
- Mr. A. F. Spring, Ventura Lodge 430, B. P. O.  
Elks, Ventura, Calif.

Mr. Elmer P. Zollner, c/o American Legion  
Convention Headquarters, American Le-  
gion Memorial Bldg., Oakland, Calif.

Kramer of American Federation of Actors has called out acts which are members of his organization. This and other labor difficulties which have caused us to miss matinee performances in Santa Ana and Pasadena necessitates us advising you with regret we will be unable to fulfill contract for Circus performance. One of our men will contact you later.

FANCHON & MARCO, INC.

Sent the night of Pomona Performance, May 31,  
1939.

[Endorsed]: Filed Nov. 22, 1940.

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MURRAY PENNOCK,

called as a witness in behalf of plaintiff in rebuttal,  
being first duly sworn, testified as follows:

Direct Examination

Q. By Mr. Combs: You have been sworn?

A. I have.

Q. What is your occupation, Mr. Pennock?

A. The show and theatrical business.

Q. How long have you been engaged in that  
business?           A. Oh, nearly 30 years.

(Testimony of Murray Pennock.)

Q. In what capacities?

A. In a managerial capacity, I should say, generally.

Q. With what circuses?

A. Well, going back to 1908 and stating them in chronological order, Norris & Rowe, Sells-Floto, Bud Atkinson in Australia, and Al G. Barnes for 12 consecutive years, and maybe one or two others I missed—Irwin Brothers Wild West, and one or two experiences intervening.

Q. Were you present at Baldwin Park in the week preceding the 23rd of May, 1939?

A. Yes, I was.

Q. Who were you with at that time? [438]

A. I was out at the winter quarters on the Sunday preceding the opening of the Great American Circus.

Q. Did you have occasion at that time to observe any circus equipment? A. Yes, I did.

Q. What was the occasion for your making that observation?

A. Well, I walked around the lot. Naturally, having been in the circus business all those years, I was interested, and I walked about the lot a good deal with Mr. Clawson. I also talked casually to Mr. Eagles and to Mr. Daillard.

Q. Did you take a look at the equipment at that time?

A. I looked at the equipment closer previously.

Q. How long previously?

(Testimony of Murray Pennock.)

A. Oh, perhaps a month or six weeks previously.

Q. Were you familiar with its condition at that time?      A. Yes.

Q. Will you state what the condition of the wagons was?

A. May I explain? I came out there—I had been engaged by M. G. M. as technical adviser of their circus picture they were preparing, and they had asked me to set up a typical show of a certain size, and after that was done they talked about the rental of equipment which was available in various places, and I suggested that we go out to Baldwin Park and look over the equipment there, which Mr. [439] Clawson had told me was for rent. I took two draftsmen, whose names I have forgotten now, and Stan Rogers, who was one of the art directors at M. G. M., out there on two or three occasions.

Q. At that time you examined this equipment minutely, did you not?

A. More or less minutely, yes.

Q. What was its condition? Was it in good condition, suitable for use at that time?

Mr. Schaefer: I will object to that, on the ground that there is no showing that the equipment was that of the Great American Circus, or that it was an examination of all of the equipment.

The Court: If he examined all of it, it would be proper. Did you examine all of the equipment?



(Testimony of Murray Pennock.)

A. All of the equipment with respect to the rolling stock, the wagons about which we are now talking.

The Court: About how many wagons?

A. At that time I believe there were 40 or 50 wagons on the lot.

The Court: Overruled.

A. Many of these wagons were old Al G. Barnes wagons which had been relegated to the back of the lot and were obsolete, some of which, as a matter of fact, I built. But the Hagenback-Wallace equipment I think we went over pretty thoroughly. The draftsmen were interested from the stand- [440] point of making drawings, presumably to fill in the archives out at the studio, should the occasion arise for building wagons in the future.

Mr. Schaefer: I submit that that isn't an answer to the question.

The Court: That is argument. What condition was it in?

A. The wagons, all of the Hagenback-Wallace wagons were in comparatively good condition.

Q. By Mr. Combs: Suitable for use?

A. Suitable for use.

Q. Did you examine the flat cars at that time?

A. I saw the flat cars, yes.

Q. What was their condition?

A. The flat cars were in equally good condition.

Q. Did you examine the rigging, tents, drops and falls?

(Testimony of Murray Pennock.)

A. Not minutely, no. I saw the ropes and rigging coiled in one of the barns. I saw the canvas rolled up, but I did not examine it closely, no.

Q. Did you have an opportunity to observe this equipment again after that date at Baldwin Park?

A. I went out to the opening of the show at Inglewood, both afternoon and evening. I left the studio and spent possibly 45 minutes to an hour on the lot in the afternoon, while the show was being prepared, and I went back again about the dinner hour in the evening, and remained until it had been partially torn down at night. I left there [441] about 12:30 or 1:00 o'clock the following morning after the performance.

Q. Did you see the equipment there?

A. Yes.

Q. What was its condition then, generally?

A. I thought it was in perfectly usable condition, such of it as I saw.

Q. What did you see?

A. I saw the big top in the air. I saw many of the wagons, in fact all of the wagons, I think. I saw the seats. I saw the poles and the other paraphernalia incident to the erection of the tent, and the stage, and ring curbs, and all those properties, in use. I looked the show over generally, as an ex-showman would.

Q. All of that show and equipment was in use at that time, too, was it not?

(Testimony of Murray Pennock.)

A. As far as I know, yes. All of it I saw was in use.

Q. Did you see the show again after that date?

A. I saw the show in Pasadena on the afternoon of Memorial Day.

Q. Did you observe the main fall rope break there? A. No, sir.

Q. Did you observe the show erected?

A. It wasn't erected. The side show was up, and they were putting up the big top at the time I went over there. At the time I normally expected the doors to be open the [442] big top was in process of erection at that time, and I was there for an hour and a half, and very little or no progress was made in that hour and a half, so I departed for home.

Q. In the circus business is it the custom to rent sleeping cars with or without berth curtains, pillow cases, sheets and blankets?

A. I have on occasion rented circus sleepers, and am more or less familiar with the practice in that connection, and I know of no instance within my knowledge where sleepers, circus sleepers, as such, are rented completely equipped.

#### Cross Examination

Q. By Mr. Schaefer: Mr. Pennock, how long did your examination take you a month previous to the Sunday you were out?

A. I was out there on three occasions, I be-

(Testimony of Murray Pennock.)

lieve, as I stated. I think each time we spent from two to three hours.

Q. How long a time did you spend examining wagons?

A. Well, fully half of the time was spent on the examination of the wagons.

Q. How many wagons did you want?

A. Did we want? [443]

Q. Yes.

A. Well, that was problematical, because at that time no definite decision regarding the size of the show to be portrayed on the screen had been arrived at.

Q. Did you ever rent any of this equipment?

A. Not that I know of, no.

Q. Your studio didn't rent it?

A. I don't know, because before the actual filming of the picture I had closed my engagement with M. G. M.

Q. You don't know of your own knowledge whether it went out?      A. I do not.

Q. The purpose for which you wanted this equipment was for filming, is that right?

A. Yes.

Q. It wasn't to be rolled from town to town?

A. That is right.

Q. And you could take as much time as you wanted to put it up?      A. That is right.

Q. And the wagons were going to be stationary all the time?      A. That is right.

(Testimony of Murray Pennock.)

Q. So you didn't pull any of the wheels off and examine the axles? A. No. [444]

Q. You made no examination at all, whatever?

A. No.

Q. You weren't interested in whether the wagons had brakes or not?

A. I wasn't particularly interested, no.

Q. What was your interest in the flat cars?

A. The interest in the flat cars at that time was the fact that they had discussed—there was a sequence in the picture showing the circus train in motion, passing from town to town at night, and it was supposed to be a night shot, and they were going to build a miniature train, and they wanted scale drawings of flat cars and coaches and stock cars, so that they could portrarry this train in motion and have it a reasonable facsimile.

Q. They weren't going to use any flat cars at all, then, for drawing purposes? A. No.

Q. So you didn't have any occasion particularly to examine these cars as to their condition?

A. I had examined them previously.

Q. How long previously?

A. I should say 60 days prior to the show going out.

Q. Did you examine the cars—

A. Thoroughly.

Q. Did you examine those that went out with the Great American Circus? [445]



(Testimony of Murray Pennock.)

A. I must have examined those, because I examined all of them.

Q. Do you recall now car No. 65, which was a stock car?

A. I can't identify the cars by number in my mind, no.

Q. Did you have in mind at the time you examined those cars and now, when you state that they were in good and usable condition, that car 65 had to have the air brakes cleaned, eight journal boxes re-packed, that one truck spring was broken, that they had to have repairs made and the car jacked, that three brake beam safety bar bolts and lock nuts  $\frac{3}{4}$  by 3 were worn out, that one brake bell crank was broken, that one bracket was broken, that two bolts and lock nuts  $\frac{5}{8}$  by  $2\frac{1}{2}$  were worn out, that one brake chain bolt  $\frac{5}{8}$  by  $2\frac{1}{2}$  was worn out, that one bell crank pin was worn out, and that two cotter keys were worn out, all on car 65? Did you know that when you made that examination?

A. Not in detail, no, sir.

Q. When you examined car 85, a flat car, did you know that one piece of train line pipe  $1\frac{1}{4}$  by 16 was rusted and needed replacing, that one coupling  $1\frac{1}{4}$  had the threads broken, that two ends of pipe had to be threaded, that there were four connections that had to be repaired, that two "U" pipe clamps  $\frac{1}{2}$  by 3 were worn out, that one pair SH wrought steel wheels had worn flanges on them, that two journal bearings, 9 inches, were worn [446]

(Testimony of Murray Pennock.)

out, that two dust guards 9 inches were worn out, that four journal box bolts and lock nuts  $1\frac{1}{8}$  by 16 were worn out, that one brake connecting cotter was worn out, that the wheels were badly worn, that eight journal boxes had to be repacked, that three journal bearings were worn and that the air brakes had to be cleaned? Did you know that when you inspected car No. 85?

A. I knew many of them, yes. None of those were major defects.

Q. Did you hear Mr. Kettring, of the Santa Fe, testify? Did you hear him testify that some things violated the Interstate Commerce laws?

A. Yes, sir.

Q. Did you hear him state that they had to be repaired before they would carry them on their lines?

A. I did.

Q. When you examined car No. 87, did you know at that time that the air brakes had to be cleaned, that eight journals had to be repacked, that six journal bearings were worn out, that four safety bar bolts and lock nuts  $\frac{3}{4}$  by 2, were worn out? Did you know that when you examined car No. 87?

A. Not in detail.

Q. Did you know when you examined car No. 80, a flat car, that one pair of SH wrought steel wheels had a worn flange, that two journal bearings 9 inch were worn out, [447] that two dust guards 9 inch were worn out, that four journal box bolts and lock nuts  $1\frac{1}{8}$  by 16 were worn out, that one

(Testimony of Murray Pennock.)

top rod was repaired because it was cut by the axle, that there were two connecting pins that had to be repaired, that one journal bearing 9 inch was worn out, that eight journal boxes had to be repacked, that the air brakes had to be cleaned, and that there had to be labor performed on those cars? Did you know that when you examined car 80?

A. Again not in detail, no, sir.

Q. When you were examining car 88, which was a flat car, did you know that two pair of SH wrought steel wheels had worn flanges, that four journal bearings 9 inch were worn out, that four dust guards were worn out, that eight journal box bolts and lock nuts were worn out, that there had to be labor performed on the wheels, that eight journal boxes had to be repacked, that two journal bearings were worn out, that two connecting cotter keys had to be replaced because they were worn out, and that the air brakes had to be cleaned? Did you know that when you examined car 88?

A. Again not in detail, no, sir.

Q. Did you know when you examined car 84, another flat car, that the air brakes had to be cleaned, that one train line nipple  $1\frac{1}{4}$  by 6 had to be replaced because it was worn out, that one SL angle cock had a leaky core, that one connection had to be repaired, that one U-clamp needed [448] repairing, that eight journal boxes had to be repacked, that five journal bearings were worn out,

(Testimony of Murray Pennock.)

that one pair SH wrought steel wheels had worn flanges, that two journal bearings were worn out, that two dust guards were worn out, that four box bolts and lock nuts  $1\frac{1}{8}$  by 16 were worn out, that labor was required on the wheels, that one side bearing bolt and lock nut  $\frac{3}{4}$  by 2 was worn out? Did you know that when you examined car 84?

A. I knew there were some flanges that needed attention and some journals that needed attention, yes.

Q. And you considered those minor details?

A. Yes, sir.

Q. Did you know when you examined car 82, a flat car, that there were eight journal boxes repacked, that the air brakes had to be cleaned, and that one journal bearing 9 inch was worn out? Did you know that?

A. Not all of it, no, sir.

Q. Did you know on car No. 81, a flat car, that eight journal boxes had to be repacked, that the air brakes had to be cleaned, and that seven journal bearings 9 inch were worn out? Did you know that when you examined car 81?

A. I knew some of it, but not all of it.

Q. Did you know when you examined car 52, which was a passenger car, that there were three carrier iron bolts and lock nuts that were worn out, and three additional ones  $\frac{3}{4}$  by 5 were worn out, and three additional ones  $\frac{3}{4}$  by 4 were [449] worn out, and that twelve journal boxes had to be repacked,

(Testimony of Murray Pennock.)

and two journal bearings had to be replaced because worn out, and that the air brakes needed cleaning? Did you know that when you examined passenger car No. 52?

A. You can't know, can't tell whether an air brake needs cleaning until the car is connected onto a train.

Q. Isn't that an element that you must take into consideration?

A. No, because air brakes are automatically cleaned and must be cleaned every so often when the train is in operation. The date of the cleaning is stenciled on the brakes, and when the time comes for subsequent cleaning it has to be taken care of.

Q. Did you examine the stenciling on the brakes?

A. I saw stenciling on the brakes of some of the cars which stated that the air had been tested only a week or two prior to the Hagenback-Wallace Show coming in. It bore the date of the preceding September, 1938.

Q. Were these some of the cars that were with the Great American Circus?

A. I don't know.

Q. And with car 50, another passenger car, did you know that there was one pair of SH wheels that had worn flanges, that two journal bearings 9 inch were worn out, that two dust guards were worn out, and that a full flange had to be restored to restore the wheels to service, that [450] there were wheels that required labor, and that twelve



(Testimony of Murray Pennock.)

journal boxes had to be repacked, and two journal bearings 9 inch were worn out, and that one journal wedge had to be drop-forged, and that the air brakes had to be cleaned? Did you know that when you examined car 50, a passenger car?

A. I think I knew everything that was faulty in connection with car 50, because I had talked to Clawson about leasing that car myself.

Q. And you thought it was in good, usable condition? A. Definitely, yes.

Q. But you thought it was in usable shape for taking over to the studio?

A. No. I was contemplating a tour of Canada with a negro choir, the Hall-Johnson Choir, and Mr. Clawson was making desperate efforts to lease me two Hagenback-Wallace cars.

Q. And car No. 45, a passenger car, do you remember that?

A. I know the No. 45 car, yes, sir.

Q. Did you see anything wrong with that car?

A. I don't recall specifically, no. The No. 50 car was the car I was chiefly interested in.

Q. Can you tell me whether you examined car No. 45 in making your inspection?

A. I knew, as any circus man knows, of course, that there were things wrong with all of those cars.

[451]

Q. I am talking about car 45 now.

A. I can't state specifically.

(Testimony of Murray Pennock.)

Q. You didn't know, then, that there was one wood end sill patch that was decayed on that, that had to be replaced? A. No.

Q. Did you know that one vestibule diaphragm had to be straightened on the car because it was bent? A. I saw that, yes.

Q. And that there were three carrier iron bolts and lock nuts that were worn and loose? Did you see that? A. I think so.

Q. Did you know that twelve journal boxes had to be repacked as per Rule 66?

A. The journal boxes on every railroad car have to be packed frequently.

Q. And that one journal bearing 9 inch had to be replaced?

A. Journal bearings have to be replaced frequently for any car in service.

Q. Did you examine passenger car No. 46?

A. Among the others, yes.

Q. Do you remember anything about that?

A. No, not particularly.

Q. That was in good condition too, was it?

A. I didn't say any of the lot were in good condition. [452] I said they were in usable condition.

Q. Would you say the cars were not in good condition?

A. They were in comparatively good condition, usable condition. To begin with, of course, they are wooden cars, and are quite serviceable for use in

(Testimony of Murray Pennock.)

circus movements, where they would not be considered good sleeping cars by the master mechanics of the Santa Fe or any other railroad, for use in passenger traffic, where train speeds are rated on a faster basis than the movements of a circus. The circus probably depended upon the equipment moving under specific running orders. I was traffic manager of the Barnes Circus for seven years, and under running orders of 20 or 25 or 30 miles an hour those cars were usable for service of that description, where they would not be considered usable by the Interstate Commerce Commission or a railroad man for passenger service work, like the Santa Fe Chief.

Q. You say 20 or 25 miles an hour would be the maximum?

A. I didn't say the maximum. I said that would be the average speed at which the train was transported.

Mr. Schaefer: No further questions. [453]

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PATRICK GRAHAM,

called as a witness in behalf of plaintiff in rebuttal, being first duly sworn, testified as follows:

Direct Examination

Q. By Mr. Combs: You have been sworn?

A. Yes, sir.

(Testimony of Patrick Graham.)

Q. Where is your place of residence?

A. Pasadena, California.

Q. Where?

A. 985 North Marengo Avenue.

Q. What is your occupation?

A. Circus employee.

Q. How long have you been engaged in that capacity?      A. 19 years.

Q. What character of work did you undertake during that 19 years?

A. All the way from cook house punk up to head porter.

Q. For what circuses?

A. I started on the John Robinson Show; Sells-Floto; Hagenback-Wallace; Sells Brothers; Al G. Barnes; McCullough Brothers.

Q. Did you work for the Great American Circus?      A. Yes, I did.

Q. And that was in May of 1939?

A. That is right. [454]

Q. Who employed you?

A. Mr. Eagles employed me.

Q. And when?      A. Friday morning.

Q. Before it went over to Inglewood?

A. Before it went over to Inglewood.

Q. Did you do anything when he employed you, or did you just wait around?

A. No. I always worked 24 hours a day when I worked any.

Q. And you went to Baldwin Park?

(Testimony of Patrick Graham.)

A. Yes, sir.

Q. What did you do when you got there?

A. He told me to take one of his trucks and come over to Los Angeles and pick up men.

Q. For what purpose?           A. For laborers.

Q. Did you do so?           A. I did so.

Q. What were you to get?           A. Men.

Q. By Mr. Combs: How many did you get?

A. I picked up 25 on the first load. I lost two on the way over, and stopped and picked up two more at Baldwin Park, and I had 21 when I wound up.

Q. Did you go for more men after that? [455]

A. I made quite a few trips, yes, sir.

Q. Were they experienced circus hands or green?

Mr. Schaefer: I object to that as calling for a conclusion of the witness.

Mr. Combs: I will withdraw it.

Q. Is that all you did there at Baldwin Park?

A. No. I had charge of the sleeping cars.

Q. What was your official capacity?

A. Head porter.

Q. In that connection did you have occasion to observe the sleepers?

A. I had four or five occasions to observe them.

Q. Did you have charge of them?

A. I had charge of them.

Q. What did you do with relation to the sleepers before you left Baldwin Park?



(Testimony of Patrick Graham.)

A. You see, I have been a head porter before in other shows. That is my business.

Mr. Schaefer: If the court please,—

A. And I carry my own crew of experienced porters.

Mr. Schaefer: I want to enter an objection that it is not responsive.

The Court: Just answer the question.

Q. By Mr. Combs: You carry your own crew of porters? A. That is right.

Q. Did you have that crew there? [456]

A. I did.

Q. Did you put them to work on these cars?

A. I did.

Q. What did you direct them to do?

A. I told them to clean the cars.

The Court: What did they do?

A. They cleaned the cars up.

Q. By Mr. Combs: From end to end; is that right? A. From end to end.

Q. With disinfectants?

A. With disinfectants.

Q. Relate exactly what you had them do in connection with cleaning the cars?

A. As was customary, we took all the mattresses out and set them out in the sun and aired them, and if there was any spots on them that we could wash off, we washed them off. They was fairly new, bought brand new in 1938, in Indiana, out of Chicago, for Howard Yberry in Chicago.

(Testimony of Patrick Graham.)

Q. Proceed.

A. And there was not much work on cleaning the mattresses, so the men went back inside after they got the mattresses out, and proceeded to clean the cars, taking the wooden slats off of the beds. As you know, our beds do not have springs. Springs are bad for the kidneys, so we have wooden slats across the bunks. They took all the slats out and washed them with disinfectants and washed the cars down [457] with disinfectants, and made whatever minor repairs was supposed to be made on the berths.

Q. Was that all you did there?

A. I sent the sheets out that we had.

Q. How many sheets did you have?

A. We had 67 that was originally Hagenback-Wallace sheets, that was left there by the people that didn't want to take them.

Q. What usually happens when a circus comes in to winter quarters with relation to sheets, pillow cases and blankets?

Mr. Schaefer: I object to that.

The Court: Sustained as to what usually happens.

Q. By Mr. Combs: What is the custom?

Mr. Schaefer: I object to the custom.

The Court: Sustained.

Q. By Mr. Combs: Then you needed more than 67 sheets for this equipment?

A. Yes, it is customary to have a few more than that.

(Testimony of Patrick Graham.)

Q. With how many cars?

A. They told me they was going to sleep 267 people.

Q. Did you contact or discuss the matter with Eagles or anyone else?

A. I think they got a little mad at me. I discussed it too many times with them.

Q. You told them you needed sheets, pillow cases and [458] blankets? A. Yes, sir.

Q. And you finally got them?

A. Yes, after I worried Mr. Daillard until he was about sick.

Q. And you got them before you left Baldwin Park, didn't you?

A. Yes. They brought them over about 7:00 o'clock Monday evening.

Q. And that was at Inglewood?

A. At Inglewood the beds was made up.

Q. Were they dirty or clean?

A. Fairly clean. I slept in them myself, and Mr. Eagles slept in them, and everybody else slept in them. There was no complaint at the time of the beds being dirty.

Q. Later on you got some berth curtains?

A. That is right.

Q. When was that? A. At San Diego.

Q. Did anything transpire with relation to berth curtains?

A. I had a little difficulty in getting berth curtains.

(Testimony of Patrick Graham.)

Q. Did you ask Eagles for them?

A. I asked Mr. Eagles for them, and he referred me to Mr. Daillard, because they made a ruling on the show that we couldn't purchase nothing without the purchasing agent's [459] order.

Q. Who was the purchasing agent?

A. Well, they had a couple of them up there. If you wanted one you couldn't find him, so we used the other one.

Q. Which one did you——

A. I finally got Mr. Daillard to go down with me.

Q. Did you have occasion to observe the condition of the flat cars in this circus?

A. Very much so.

Q. What was their condition?

A. I would say they was good. I have worked on worse.

Q. By Mr. Combs: What was the condition of the runs?           A. Very good.

Q. What was the condition of the wagons?

A. Good.

Mr. Schaefer: I will object to that and move to strike the answer on the ground that there is no foundation laid for the answer to that question.

The Court: The court will consider it, if it has any value.

Q. By Mr. Combs: There was a toilet in one of these cars. What was the style of the toilets in these cars? [460]

(Testimony of Patrick Graham.)

A. We had two lavatories in each car, naturally, one at each end, for both sexes, the women on one end and the men on the other. The lavatories was inspected in the Santa Fe shops over here in Los Angeles.

Q. Did they pass them at that inspection?

Mr. Schaefer: Just a minute. I object to that on the ground that no foundation has been laid for it.

The Court: Sustained.

Q. By Mr. Combs: Did the Santa Fe direct you to do anything in the lavatories?

A. No.

Mr. Schaefer: I object to that on the ground——

The Court: Well, he has answered no, and the answer is against him.

Mr. Schaefer: Well, I can't hear his answers, your Honor.

The Court: Speak so that he can hear you.

Q. By Mr. Combs: All right. What was the style of the lavatories there? Were they flush or non-flush lavatories?

A. They would flush.

Q. The toilets in particular, how were they flushed?

A. They had a ratchet on the side, and all you had to do was just push down and the toilets flushed.

Q. Was that the case with all of these toilets?

A. That is right. [461]



(Testimony of Patrick Graham.)

Cross Examination

Q. By Mr. Schaefer: Mr. Graham, how long have you served as porter with circuses?

A. 12 years.

Q. In the capacity of porter?

A. In the capacity of porter.

Q. And you were the one that was in charge of these sleepers; is that right? A. That is right.

Q. What was the condition of the floors of the sleepers, the carpets?

A. Mr. Carter, who was boss porter, had new carpet put in.

Q. I am asking you the condition of these cars as they were in May, 1939? A. They was good.

Q. Were there any holes in the carpets?

A. No, sir.

Q. Were you present this morning when Tiny Kline testified? A. Yes, sir, I was.

Q. Did you hear her testimony?

A. Yes, I was here and I heard it.

Q. You say there were no springs in these sleepers? [462] A. No, sir.

Q. The mattresses were new?

A. They was new in the spring of 1938.

Q. That was the year before?

A. That is right.

Q. Did you purchase them?

A. Mr. Nick Carter purchased them.

Q. Were you porter, when they were purchased, on these cars?

(Testimony of Patrick Graham.)

A. I was through Indiana when they was purchased.

Q. And you saw these mattresses purchased in Indiana in 1938?      A. Yes.

Q. What kind of mattresses were they?

A. They was cypress mattresses with a cotton filling.

Q. Did they have any springs in them?

A. No, sir.

Q. Then there were no springs in the beds at all?      A. No.

Q. These 67 sheets, were they furnished?

A. They was just there.

Q. And they were taken?

A. We used them, yes.

Q. And you had 267 people to sleep?

A. That is right.

Q. You don't supply berth curtains every time a car [463] goes out, buy new ones?

A. It is according to who takes the show out.

Q. Were there any berth curtains for these sleeping cars out at winter quarters?      A. No.

Q. What happened to them?

A. I would have to explain that.

Q. Don't you ever have berth curtains for these cars?

A. In certain circumstances, yes. There was a little difficulty on the Hagenback-Wallace Show when it closed, and the people took what they could carry, and the berth curtains was pretty good ma-

(Testimony of Patrick Graham.)

terial, so they took them, and the blankets and sheets.

Q. They didn't take the mattresses, did they?

A. They are a little too bulky to carry.

Q. You say the car was fairly clean. Just what character of cleanliness is fairly clean? Does that mean partly dirty?

A. No, sir. You see, we always fumigate cars.

Q. That is the law, isn't it?

Mr. Combs: He doesn't know the law.

Q. By Mr. Schaefer: Is that the law?

The Court: Well, he is asking what he did. He is not asked about the law.

Q. By Mr. Schaefer: Are you required to fumigate them?

A. To a certain extent, yes. [464]

Q. They were fumigated?

A. No. We used another method.

Q. You didn't fumigate?

A. We didn't have time to fumigate.

Q. When did you begin getting the cars ready?

A. Friday morning at 7:30.

Q. And you left the winter quarters what time?

A. Monday evening.

Q. So you worked on them from Friday until Monday?      A. Yes, sir.

Q. You say you had no complaints about cleanliness. You were here this morning when the seven ladies from the Fanchonettes were here?

A. My time was taken up entirely in——

(Testimony of Patrick Graham.)

Q. You did say the toilets were all in good, clean, working condition?

A. The toilets were in good condition.

Q. Did you say the water was flushing in all the toilets?      A. It was. [465]

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CHARLES W. NELSON,

recalled as a witness on behalf of plaintiff in rebuttal, testified further as follows:

Direct Examination

A. Yes. Mr. Clawson and myself and some other individual was standing in what was afterwards to become the backyard of the show, as we call it, and there was a truck being unloaded just in front of us by a couple of young fellows. They were unloading the calliope off of the tail-boards, and instead of letting it slide down straight, they had it at an angle, so it was at an angle, and it slipped and struck the ground and toppled over. [467]

[Endorsed]: Filed March 12, 1941.

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[Endorsed]: No. 9779. United States Circuit Court of Appeals for the Ninth Circuit. Fanchon & Marco, Inc., a Corporation, Appellant, vs. Hagenbeck-Wallace Shows Company, a Corporation, Appellee. Transcript of Record. Upon Appeal from

the District Court of the United States for the Southern District of California, Central Division.

Filed March 29, 1941.

PAUL P. O'BRIEN,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

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In the United States Circuit Court of Appeals  
for the Ninth Circuit

No. 9779

FANCHON & MARCO, INC., a corporation,  
Appellant,

vs.

HAGENBECK-WALLACE SHOWS COMPANY,  
a corporation,  
Appellee.

STATEMENT OF POINTS RELIED UPON  
AND DESIGNATION OF RECORD.

Point I.

The following paragraphs of the Findings of Fact are not supported by the evidence:

II, III, IV, IX, X, XI, XIII and XVI.

Point II.

The District Court erred in drawing inferences from the non-production of evidence, in paragraphs IX and X of the Findings of Fact.



## Point III.

That the judgment is not supported by the Findings of Fact and Conclusions of Law.

## Point IV.

The District Court erred in the admission of testimony objected to by appellant.

DESIGNATION OF PARTS OF RECORD NECESSARY FOR CONSIDERATION OF THIS CASE.

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Amended Designation of Contents of  
Record on appeal ..... 48

This specification of points relied upon,  
and the designation of the record.

That portion of the reporter's transcript of the  
testimony as follows:

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Charles W. Nelson:				
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	96	7		12
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George Singleton:				
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	110	26	111	4
	111	12		20
	113	17		21
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Ralph J. Clawson:				
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	145	13		22
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J. V. Austin:				
	301	17	302	8
	302	17	303	14
	309	11		13
	309	20	310	15
Murray Pennock:				
	385	13	388	17
	389	16	399	22
Pat Graham:				
	402	7	404	8
	405	16		19
	406	16	407	26
	408	12	409	20
	411	12		20
Marco Wolff:				
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	185	6		26
Patty Hackett:				
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Tiny Kline:				
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	Page	Line to	Page	Line Incl.
Wayne Dailard:				
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Jack W. Kramer:				
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	318	23	319	4
Charles E. Cunningham:				
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Charles H. Priest, Jr.:				
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				12
Walter S. Guice:				
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	378	12	379	6
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Dated: March 28th, 1941.

MacFARLANE, SCHAEFER,  
HAUN & MULFORD,  
JAMES H. ARTHUR and  
WILLIAM GAMBLE  
By HENRY SCHAEFER, JR.,  
Attorneys for Appellant.

Received copy of the within Statement this 28th  
day of March, 1941.

COMBS & MURPHINE,  
Attorneys for Appellee.

[Endorsed]: Filed Mar. 29, 1941. Paul P. O'Brien,  
Clerk.

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[Title of Circuit Court of Appeals and Cause.]

APPELLEE'S DESIGNATION OF DOCU-  
MENTS, RECORDS AND PROCEEDINGS  
TO BE INCLUDED IN RECORD ON AP-  
PEAL, AND TO BE INCLUDED IN THE  
PRINTED TRANSCRIPT THEREOF.

Comes now the Appellee, Hagenbeck-Wallace Shows Company, a corporation, within ten days of the date of the service upon it of Appellant Fanchon & Marco, Inc's State of Points Relied Upon and Designation of Record, and designates the following documents, records and proceedings, and portions of the record which it believes necessary to a proper determination of the above entitled case



on appeal, including portions of the reporter's transcript of testimony received during the trial.

I.

Appellee's Exhibits A-1 and A-2.

II.

Appellant's Exhibits 1 to 17 inclusive.

III.

The following portions of the reporter's transcript of the testimony and proceedings before the trial court, as set forth by line and page, as follows:

1. Page 2, line 19, to page 9, line 15 inclusive, being certain preliminary statements and stipulations.

2. Page 10, line 8 to page 18, line 4; page 31, line 13 to page 36, line 20; page 37, line 3 to page 42, line 7; page 42, line 14 to page 50, line 8, being all of the remainder of the direct examination of Paul Eagles, beyond that requested by Appellant herein.

3. Page 56, line 13 to page 56, line 15; page 64, line 23 to page 67, line 3; page 70, line 6 to page 72, line 7; page 85, line 8 to page 89, line 14; page 91, line 12 to page 92, line 19, being portions of the cross and redirect examination of Paul Eagles.

4. Page 93, line 1 to page 95, line 15; page 95, line 22 to page 96, line 6; page 96, line 13 to page 98, line 26, being all of the remaining examination of Charles W. Nelson not requested by Appellant.

5. Page 101, line 1 to page 107, line 4; page 107, line 13 to page 110, line 26; page 111, lines 5 to 11;

page 111, line 21 to page 113, line 16; page 113, line 23 to page 116, line 5; page 116, line 25 to page 117, line 24, being all of the remaining examination of George Singleton not requested by Appellant.

6. Page 125, line 1 to page 133, line 4; page 134, line 25 to page 136, line 8; page 137, line 9 to page 145, line 12; page 145, line 23 to page 148, line 8; page 148, line 16 to page 149, line 4; page 158, line 3 to page 159, line 16; page 160, line 1 to page 161, line 14, being portions of the testimony of Ralph J. Clawson not requested by Appellant herein.

7. Page 299, line 1 to page 301, line 15; page 302, line 9 to page 302, line 16; page 303, line 15 to page 309, line 10, being portions of the testimony of J. V. Austin not requested by Appellant herein.

8. Page 312, line 1 to page 314, line 7; page 317, line 3 to page 318, line 22, being portions of the testimony of Jack W. Kramer not requested by Appellant herein.

9. Page 327, line 19 to page 327, line 26, being portions of the testimony of Charles E. Cunningham not requested by Appellant herein.

10. Page 350, line 14 to page 353, line 3; page 354, line 11 to page 355, line 6, being portions of the testimony of Charles H. Priest, Jr. not requested by Appellant herein.

11. Pages 384, line 4 to page 388, line 7; page 388, line 18 to page 389, line 11, being portions of the testimony of Murray Pennock not requested by Appellant herein.

12. Page 400, line 1 to page 402, line 6; page 404, line 9 to page 405, line 15; page 405, line 20 to page 406, line 11; page 408, line 4 to page 408, line 11; page 409, line 21 to page 411, line 11, being portions of the testimony of Pat Graham not requested by Appellant herein.

13. Page 413, line 6 to page 413, line 10, being portions of the testimony of Charles W. Nelson not requested by Appellant herein.

14. Page 212, line 14 to page 212, line 25, being portions of testimony of Marco Wolff.

Dated this 1st day of April, 1941.

COMBS & MURPHINE

By LEE COMBS,

Attorneys for Appellee.

Received copy of the within Designation this 1st day of April, 1941.

MacFARLANE, SCHAEFER,

HAUN & MULFORD,

By W. F.

Attorneys for Appellant.

[Endorsed]: Filed Apr. 2, 1941. Paul P. O'Brien,  
Clerk.

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[Title of Circuit Court of Appeals and Cause.]

### STIPULATION

Whereas, the Appellee has designated for inclusion in the printed record certain exhibits being Appellant's exhibits 1 to 13, and

Whereas, it is agreed upon by the Appellant and by the Appellee, through their respective counsel undersigned, that for the consideration of this case it is unnecessary that all of said exhibits be printed in the record.

Now, Therefore, It Is Hereby Stipulated, that Appellant's Exhibit 1 is to be reproduced in its entirety in the printed record and that Exhibits 2 to 13 inclusive may be omitted except a notation as to the parties thereto and the date of execution.

Dated: April 9, 1941.

COMBS & MURPHINE

By LEE COMBS

Attorneys for Appellee

MacFARLANE, SCHAEFER,

HAUN & MULFORD,

JAMES H. ARTHUR and

WILLIAM GAMBLE

By HENRY SCHAEFER, JR.,

Attorneys for Appellant.

Good cause appearing therefor,

It Is Hereby Ordered, that the printed record may be made to conform to the above stipulation.

Dated: April 14, 1941.

CURTIS D. WILBUR,

Judge of the Circuit Court of  
Appeals.

[Endorsed]: Filed April 14, 1941. Paul P.  
O'Brien, Clerk.

